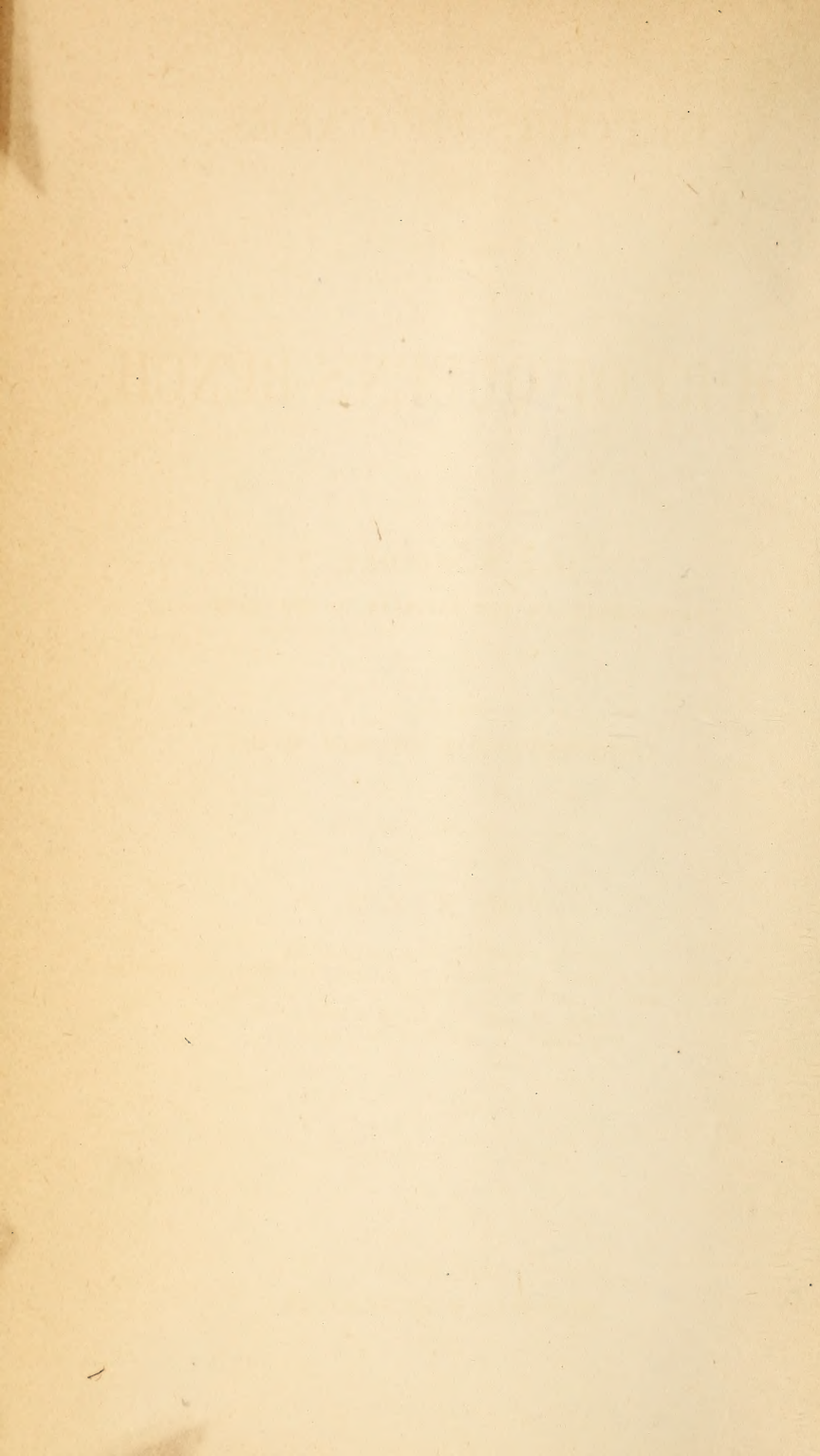




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REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

H. C. W. WETHEY,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

EDITED BY

CHRISTOPHER ROBINSON, Q. C.

VOL. XXXIII.

CONTAINING THE CASES DETERMINED
FROM MICHAELMAS TERM, 36 VICTORIA, TO MICHAELMAS TERM, 37 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND DIGEST OF THE PRINCIPAL MATTERS.

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DURING THE PERIOD OF THESE REPORTS.

THE HONORABLE WILLIAM BUELL RICHARDS, C. J.
" " JOSEPH CURRAN MORRISON, J.
" " ADAM WILSON, J.

Attorney-General.

THE HONORABLE OLIVER MOWAT.

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IN THE COURT OF ERROR AND APPEAL.

SHERBONEAU (Plaintiff in Court below) *Appellant*, v.
THE BEAVER MUTUAL FIRE INSURANCE COMPANY (Defendants in Court below) *Respondents*).

Insurance—Fixtures—Estoppel.

The plaintiff insured with defendants a barn as appurtenant to his freehold. After it was burned, he made a claim under the policy, still treating it as appurtenant to the freehold, but having failed in proving title to the land, he sought to recover on the ground that the barn was a chattel, and as such, insured by him.

Held, affirming the judgment below, that he was precluded from setting up such a claim, and that the plaintiff could not be heard to say the barn was a chattel.

APPEAL from the judgment in the case, reported in 30 U. C. R. 472. The declaration was on an insurance policy on a barn—the material pleas were: 2nd. That plaintiff, in his account of the loss, represented himself to have been *bona fide* owner of the property, and that his title was by possession, when in fact he had no title. 3rd. That plaintiff was not interested in the property insured as alleged.

It was held in the the Court below, that the plaintiff's statement of title was untrue as regarded the land; that the barn being a fixture, and insured as part of the land could not be claimed for as a chattel; and that he thereupon could not recover

The plaintiff appealed upon the following grounds:—(1.) The property insured and which was destroyed by fire, and for the value of which this action is brought was chattel property, and as such was not effected by the changes which occurred to the freehold upon which it was situate, and to which the appellant was no party. (2.) Because the proceedings taken by the appellant in the Court of Chancery, had not terminated at the time of the destruction of

the property in question by fire. (3.) Because the appellant had an insurable interest in the property destroyed by fire, being in possession thereof at the time of the fire, and he was contesting his right thereto and to the land on which it was situate at the time of the fire. (4.) Because the appellant's interest in the property in question is fairly and truly stated as far as any acts of his are concerned both at the time of effecting the insurance and at the time of the fire. (5.) Because the appellant could have removed the barn in question, without any injury to the freehold, or without making himself liable to any one for its removal. (6.) Because, although the appellant's legal estate in the land had become for the time being subject to a higher claim, yet he was at the time of the fire, by a suit in Chancery, endeavouring to vindicate his rights to the land, and could not have known absolutely the final result of the said suit, and being in possession of the barn at the time of the fire, the appellant submits that he stated truly the nature of title thereto, and that he had an insurable interest.

The evidence relied on by the counsel and read in the argument in appeal, was as follows :—

Peter Sherboneau sworn : I live in Hungerford. I am brother of the plaintiff. I know the west-half of 15 in 6th concession of Hungerford. I was born on the lot ; my brother has been living on the lot for thirty years, my father lived on the lot as long as I can recollect. thirty-seven years, until lately. The plaintiff and my father have lived on the lot since father first went on it. I have a brother, Gabriel. There was an arrangement between father and the plaintiff and Gabriel about this lot. Plaintiff is the eldest son of my father. My father and Gabriel executed a deed to plaintiff ; I was a witness to it ; my father destroyed it five or six years ago, and between four or five years after it was made I saw the fragments of the deed ; it was a quit claim deed of the land to Frank the plaintiff ; it was intended for that ; my father took it out of plaintiff's chest to destroy it ; he thought, that if he destroyed

it, fifty acres would come back to him. Plaintiff was in the bush when it was destroyed. Plaintiff did not know of the destruction of the deed, I think, for three or four years. There was a barn on the premises before the deed was given; it was built by the father, Frank, and Gabriel. Father was then old. Can't recollect what year the barn was built. The barn was built on loose stones—abutments—no wall with mortar; the barn could be lifted off the stones. Plaintiff was to support my father as long as he lived for executing the quit claim to him, and he gave Gabriel fifty acres of land. Gabriel went to live on that fifty acres, and afterwards sold it for \$600. I think the plaintiff also gave Gabriel one horse, and a couple of head of young cattle. Gabriel left the premises then. Plaintiff always supported father, and was in possession until and after time of fire.

Cross-examined—My father had merely possession of the land. I have heard him say he traded a place with a man for it, and moved on it. Father had no title but possession. My brother left the premises some time last winter; he was afraid, I suppose, that he would be put off; he knew he had to leave the place, because he had no title to it after being beat in this suit. The suit had been before the fire. The fire took place on the night of 14th or 15th June, 1869. (The judgment was entered upon the 12th June, 1869.)

James Young sworn: I live in Hungerford. I drew a quit claim deed between the Sherboneau's from plaintiff's father to the plaintiffs, as near as I can remember, June, fifteen or sixteen years ago; Gabriel was present; whether he signed the deed or not, I cannot say; he was willing that the deed should be executed. I think it was about 1844, 1845, or 1846. Plaintiff was to support the old man and woman; and plaintiff gave Gabriel fifty acres on Clare river. Gabriel went to that lot, and lived there. Plaintiff remained in possession until and at the time of fire. There was a suit in Court just before the fire, at which I was a witness in Chancery.

Cross-examined—It was a Chancery suit brought by plaintiff against James Jeffs. The plaintiff was beaten in that suit just before the fire.

Robert McCamon sworn: I am a J. P. of County; live in Hungerford; know the Sherboneau family a long time, rising of thirty years, living in 15th, on the 6th concession all that time. Plaintiff made an arrangement with Gabriel for his interest in the lot seven or eight years ago, or may be more. I understood that the father and Gabriel quit claim all interest to the plaintiff. Plaintiff neither reads nor writes; was in possession at the time of the fire. He came to me after the fire about his claim papers. I drew them out.

Francis McAnnany, sworn: I was C. L. Agent in this county for a long time. I produce a book, furnished me by the C. L. Department, shewing the amount due for arrears on lands sold prior to my appointment, and who the purchasers of such lands were; (looks at entry of sale of 15, in 6th concession of Hungerford;) entered as sold to Edward McGuire, on 1st October, 1835, 200 acres; there is a memorandum in my handwriting in pencil, transferred to Sherboneau (no date). I must have been told it was before I made this memorandum.

The affidavit of loss by the plaintiff stated, among other things, 1. That I am the holder of policy numbered as above, of which the following is a copy of the written portion:

On barn. No. 1, two hundred dollars.....	\$200
On ordinary contents of barn, two hundred dollars.....	200

In all, four hundred dollars..... \$400

2. That the barn above insured was destroyed by fire on Monday night of the 14th of June, or morning of the 15th.

3. That I am the *bonâ fide* owner of the property above stated to be destroyed, holding the same by possession, for, or during the the last thirty-five years, me and my father Francis Sherboneau.

4. That by reason of the said fire I have actually lost property to the amount of four hundred dollars as specified in the annexed schedule; the prices or value set after each article being the actual cash value of the same, according to the best of my knowledge and belief.

Schedule referred to :

	<i>Loss on buildings.</i>	<i>Lowest cash price.</i>
Barn		\$400

Loss on Movable Property.

(Specify loss on each article separately.)

Total loss	\$400
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The case was argued in appeal on the 28th June, 1872 (a).

Harrison, Q. C., for the appellant. The question is not merely, whether the barn was freehold or chattel, for independently of that the plaintiff should recover on the ground of his possessory title, which was shewn by the evidence of Peter Sherboneau and of McCamon. It shewed that the father had been in possession for thirty-five years. The evidence of McAnnany shewed, that in the Crown Land Department a memorandum had been made on the map of the transfer to Sherboneau of the lot upon which the barn stood. When he insured there was no dispute as to the title. [SPRAGGE, C.—The proceedings in Chancery, which terminated in declaring the title out of the plaintiff, were pending when the insurance was effected.] On this point he referred to *Shaw v. Phoenix Insurance Co.*, 20 C. P. 170, 179, and to the affidavit of the plaintiff set out above. The defendants have not set up the Mutual Insurance Act, and cannot rely now upon it to defeat the plaintiff: *Milligan v. The Equitable Insurance Co.*, 16 U. C. R. 314; *Richards v. Liverpool and London Fire and Life Insurance Co.*, 25 U. C. R. 400; *Stevenson v. London and Lancashire Fire Insurance Co.*, 26 U. C. R. 148; *Smith*

(a) *Present*—DRAPER, C. J. of Appeal; SPRAGGE, C.; HAGARTY, C. J. C. P.; MORRISON, J.; GWYNNE, J.; STRONG, V. C.

v. Royal Insurance Co., 27 U. C. R. 54; *Mason v. Agricultural Insurance Co.*, 18 C. P. 19.

The defendants should not be allowed to set up the *jus tertii*: *Stevenson v. London and Lancashire Insurance Co.*, 26 U. C. R. 148; *Smith v. Royal Insurance Co.*, 27 U. C. R. 54.—[HAGARTY, C. J. Have you any authority to go so far when a title paramount has intervened and superseded the other?] None; it is not necessary to go so far here, as the sheriff had not enforced the writ against the plaintiff when the fire occurred.

As to the question of insurable property. The evidence shewed that the barn was not attached to the freehold. It rested by its own weight on the loose stones that supported it.—[SPRAGGE, C. A barn resting on pickets has been held a fixture both in the Court of Chancery and in this Court.] The intention of the parties must also be considered. Both the mode of construction and the intention of the parties here shewed that it was not a fixture: *Culling v. Tuffnall Bull*, N. P. 34; *Naylor et al. v. Collinge*, 1 Taunt. 19; *King v. The Inhabitants of Londonthorpe*, 6 T. R. 377; *Hellawill v. Eastwood et. al.* 6 Ex. 295; *Penton v. Robart*, 2 East 88; *King v. The Inhabitants of Otley*, 1 B. & Ad. 161; *Wiltshear v. Cottrell*, 1 E. & B. 674; *Brandon v. Scott* 7 E. & B. 236; *Gardiner v. Parker*, 18 Grant 26; *Carscallen v. Moodie*, 15 U. C. R. 304; *Chisholm v. Proudfoot*, 15 C. P. 207.

Gasco v. Marshall, 7 U. C. R. 193, referred to by Richards, C. J., in his judgment in the Court below, is distinguishable from this case: see *Amos & Ferand on Fixtures*, 3rd ed. 97.

J. H. Cameron, Q. C., for the respondents. The principal question is that last referred to. The evidence shewed the plaintiff never regarded the barn as a chattel, and he stated in the schedule to the affidavit of loss that he had no movable property. The plaintiff never had the barn except by conveyance; and therefore never had it except as affixed to the freehold. He claimed title under the deed from his father. These facts militate against the conclusion of Mr. Justice Wilson, and are not referred to in his judg-

ment. The plaintiff was therefore only a trespasser. Besides the plaintiff claimed as a *bonâ fide owner* of the property, and only a very ingenious construction could justify that claim. This is a stronger case than *Mason v. Agricultural Mutual Insurance Co.*, 18 C. P. 9. The respondents would never have insured the plaintiff if he had told them that an action of ejectment was pending against him. At the time of the fire there was a judgment at Law and in Equity. The writ was in the sheriff's hands. The appellants had paid the owner having the legal title. The appeal should be dismissed: *Holland et. al. v. Hodgson et al.*, 26 L. T. N. S. 709; *Paterson v. Pyper*, 20 C. P. 278; *Langbottom v. Bury*, L. R. 5 Q. B. 123.

Harrison Q. C., in reply. This is not a case of no title, or of an incumbered title, but an endeavor to destroy a title by an *ex post facto* recovery and judgment. The Mutual Insurance clauses cannot apply in this instance, as the policy was a cash policy, and when a Mutual Insurance Company has departed from its ordinary system, it must be treated as an ordinary Company.

DRAPER, C. J., of Appeal, delivered the judgment of the Court.

The contract between the plaintiff and the defendants, was an undertaking by the latter to insure the former against loss by fire, on a barn which he represented as appurtenant to his freehold. The barn being burned down he claimed indemnity from the defendants for its loss, still treating it as appurtenant to his freehold. He then set up no claim against the defendants on account of this barn as being movable property; but, on the contrary, he endeavoured to shew a possessory title to the land, on which the barn had stood, in his father, which title was subsequently transferred to himself, and he asserted no right to the barn, except that it passed to him as part of, or appurtenant to, the land.

On this state of facts it appears to me the plaintiff cannot be heard to put a new construction on the contract,

and so to vary and change the nature of the defendants' engagement. His claim as made in the first instance, was for loss of a barn which he had described as situate on a lot of land in Hungerford. He did not himself treat the barn as movable property in his statement of actual loss sustained through the fire. But now, when it appears another person has made good his title to the land on which the barn was erected, and has been paid for the loss of the barn as we are told, he seeks to recover the amount insured, on the footing that the barn was a movable, and as such was insured by him. This altered claim arises from the fact that it turns out he has not the right to the land which he asserted when he effected the insurance on the barn as being on the land he claimed to own, but has left.

We think he cannot succeed, and that the judgment of the Court below should be upheld.

Appeal dismissed.

TENCH (Plaintiff in the Court below) *Respondent*, and
THE GREAT WESTERN RAILWAY CO. (Defendants in the
Court below) *Appellants*.

Libel, publication by agent of corporation—Privileged communication—16 Vic. ch. 99, sec. 10.

S., the general manager of the defendants' railway, without special instructions of the directors, dismissed the plaintiff, a couductor, for alleged dishonesty; and by his directions placards describing the offence, and stating the plaintiff's dismissal, were posted up in the company's private offices (in some of which they were seen by strangers), and in circular books of the conductors, for the information and warning of the company's employees, 2000 in number.

Held, affirming the judgment of the Court below :

1. That the defendants were liable for the publication as being an act done by their general manager in their interest and within the general scope of his duty.
2. That the communication to the employees was privileged, as made by a person having a duty or interest to persons having a corresponding duty or interest.
3. Per DRAPER, C. J. of Appeal, HAGARTY, C. J. C. P., GWYNNE, J., GALT, J., STRONG, V. C., and BLAKE, V. C.—The evidence shewed a

reasonable mode of publication, and no excess such as to take away the privilege or shew malice. Per RICHARDS, C. J., SPRAGGE, C., and WILSON, J.—There was excess in the mode of publication, which was evidence of malice.

4. That this was not an action within 16 Vic. ch. 99, sec 10, and necessarily to be brought within six months.

The facts in this case will be found in the report in the Court below, 32 U. C. R. 452, and in the judgment of the Chief Justice of Appeal, set out below.

The defendants assigned as grounds of appeal—1. That there was no evidence that the defendants authorized the publication of the hand-bill: that there was no resolution of the directors or action of them as a board in relation thereto, and that the act of the general manager was not in such a matter within the scope of his duty, so as to bind the Company. 2. That the hand-bill was a privileged communication: that the general manager swore that he did it in good faith, in the execution of his duty, as a protection to the defendants, and as a warning to the other servants: that if a privileged communication by the defendants, the defendants could not be made liable for acts in excess of the orders for publication given by the general manager to McGrath. 3. That the action was not brought within six months.

The case was argued in appeal, on the 6th of January, 1873 (a).

J. H. Cameron, Q. C., for the appellants, defendants in the Court below.

The question of the justification having been proved in fact may be laid aside, as no motion is made on that ground. First, the Company were not liable for the acts of their manager under the present circumstances. The liability stands on a different footing than that proceeded upon in the Court below. This case was not like *Limpus v. The London and General Omnibus Co.*, 1 H. & C. 526.

(a) *Present*—DRAPER, C. J. of Appeal, RICHARDS, C. J., SPRAGGE, C., HAGARTY, C. J. C. P., WILSON, J., GWYNNE, J., GALT, J., STRONG, V. C., and BLAKE, V. C.

There the manager was doing an act necessary for the company: here he was not. This was, on the contrary, an act done outside the usual business of the Company. It was no part of the business of a Railway Company to publish documents.

No antecedent order by the directors to Mr. Swinyard, nor any ratification of his act has been shewn or alleged. The publication was not within the scope of his authority or duty, but was a matter of discretion or judgment with him. [HAGARTY, C. J. C. P.—Could he not bring all the servants of the Company together, and harangue them? and if that would be within the scope of his authority, would he not also be authorized to issue writings?] [WILSON, J.—Is not Swinyard bound to communicate the fact of one conductor's dishonesty to the other conductors?] Yes. [WILSON, J.—Then has he not bound the Company?] No; for it is alleged he did more here, and in that excess he could not bind the Company: *Whitfield v. South Eastern Railway Co.*, 3 E. & B. 115.

Next, the communication was clearly privileged, if published only as Mr. Swinyard directed, and the Company could not be responsible for what was done beyond his written instructions. If McGrath did more than Mr. Swinyard told him to do the Company were not liable for McGrath's acts: *Lawless v. The Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262; *Wason v. Walter*, L. R. 4 Q. B. 73; *Henwood v. Harrison*, L. R. 7 C. P. 606; *Laughton v. Bishop of Sodor and Man*, 21 W. R. 204.

Lastly, the action was not in time: *McCallum v. Grand Trunk Railway Co.*, 31 U. C. R. 527; *Garton v. Great Western Railway Co.*, E. B. & E. 837.

Harrison, Q. C. A master will be bound by work done in excess of his instructions, if it is done by the servant in relation to his service and in the supposed interest of the master. In *Limpus v. London and General Omnibus Co.*, 1 H. & C. 526, the servant acted in direct opposition to, and not merely in excess of, the instructions of his master. In *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, a

servant was held to have bound his master by a fraudulent guarantee. See also *Allen v. London, &c., South-Western Railway Co.*, L. R. 6 Q. B. 65. [WILSON, J.—If a servant is driving his master's horse and damage ensues, the master is liable if the driving was in his service, but it is otherwise if the servant was driving his master's horse on a frolic:] *Poulton v. London and South-Western Railway Co.*, L. R. 2 Q. B. 534, is in direct conflict with *Bayley v. The Manchester, Sheffield, and Lancashire Railway Co.*, L. R. 7 C. P. 415. If this case is pushed to the limit no company could be held liable for libel. As to cases of libel against public companies see *Alexander v. North-Eastern Railway Co.*, 6 B. & S. 340; *Gwynn v. South-Eastern Railway Co.*, 18 L. T. N. S. 738; *Philadelphia, Wilmington, and Delaware Railway Co. v. Quigley*, 21 Howard 202; *Edwards v. London and North-Western Railway Co.*, L. R. 5 C. P. 445, and the language of Keating, J., at p. 449; *Allen v. South-Western Railway Co.*, L. R. 6 Q. B. 65; *Walker v. Great Western Railway Co.*, L. R. 2 Ex. 228. Power will be implied in a general manager (a). The fact that the hand-bills were printed for and paid for by the Company, and that the account therefor had never been disputed, was some evidence of authority to the general manager or confirmation of his acts. See also *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341. Mr. Swinyard in his evidence distinctly said, that it was his duty to issue such notices as this; and in face of that, which was not disputed by any of the directors who were called, how could it be said there was no evidence of authority?

Next, if the communication was privileged, its object could have been effected by a circular to the thirty-six conductors. There was no necessity to put it up in the shape of posters, and it was an excess to put it up in public offices. It was addressed to conductors and "others," and Tench's name was put in large type. The instructions, too, shewed that more was intended to be done than was requi-

(a) As to such implied authority see *Moore v. Metropolitan Railway Co.*, L. R. 8 Q. B. 36.

site. One notice was to be put in each conductor's book, one in each station-master's office, and in each booking-office when not part of the station. The evidence also shewed that the placards had been placed where others than the employees only could see them. The onus was on the defendants to shew that the communication was privileged: if there was any doubt the finding is against them. As to what is a privileged communication see *Harrison v. Bush*, 5 E. & B. 344; *Brown v. Croome*, 2 Starkie 297; *Padmore v. Lawrence*, 11 Ad. & E. 380; *Oddy v. Lord George Paulet*, 4 F. & F. 1009; *Fryer v. Kinnersley*, 15 C. B. N. S. 422; *Force v. Warren*, 15 C. B. N. S., 806; *Philadelphia, Baltimore, and Wilmington Railway Co. v. Quigley*, 21 Howard, 202. [WILSON, J. —Others than conductors were entitled to see it.] Mr. Swinyard said, he only wished to reach conductors: *Lawless v. Anglo-Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262, is in the plaintiff's favor. There the notice was by circular; and so here it might be conceded to be privileged if the notification had been to all the employees by circular.

The question as to bringing the action within six months scarcely needs argument. It is only necessary to read 16 Vic. ch. 99, sec. 10, to see that this did not come within it. This was not an action for something happening by reason of the Railway, or done in pursuance of the Act. See also *Palmer v. Grand Junction Co.*, 4 M. & W. 749; *Carpue v. London and Brighton Railway Co.*, 5 Q. B. 747; *Browne v. Brockville and Ottawa Railway Co.*, 20 U. C. R. 202; *McCallum v. Grand Trunk Railway Co.*, 31 U. C. R. 527.

J. H. Cameron, Q. C., in reply. The evidence shews that the intention was to post the notice in private offices, and that that only was done. The only evidence that might appear to the contrary was that of Judge Lawder, and on examination it would appear that he, too, read the notice in the private office. As to the suggestion that it would have been better to send circulars, the employees could have left the copies about or shewn them, and the

publicity and probable injury to the plaintiff would have been much greater.

DRAPER, C. J., OF APPEAL.—A short statement of facts will be convenient, though the appeal turns upon a strictly legal question.

The respondent was a conductor on the appellants' railway. The appellants' managing director, prior to the circumstances hereafter stated, had reason to suspect that frauds were perpetrated in receiving and dealing with passenger tickets, and employed detectives to investigate and find out the truth.

On the 6th or 7th of October, 1868, an envelope with a postage stamp or stamps on it was dropped in the post office at Hamilton station. The mail clerk there stamped it and cancelled the postage stamp on the 7th, and forwarded it to the city office at Hamilton. It was addressed, "Mark Wells, Hamilton." [The only Mark Wells, of whom any account is given, lived near the Spencer House, Niagara Falls, and was a conductor on the New York Central.] This envelope was sent to the dead letter office at Ottawa after a lapse of three months. It came into the hands of Mr. Swinyard, the managing director of the appellants, and it then contained "four coupons, and the two" produced at the trial (but not set out in the appeal book.) Mr. Swinyard handed (in March, 1869,) this letter to James Robb, who was employed by the appellants as their superintendent in police matters.

Robb stated that there were four coupon tickets enclosed in the envelope: that on the 31st March, 1869, he saw the respondent, and shewed him the address, saying he thought it was respondent's writing; the respondent said it looked like it, but he then offered no explanation. On the 2nd April the respondent told Mr. Robb that he now recollected the circumstances; that he had been requested by Pearse, the custom house officer on the train, to address it for one of the "niggers" on the sleeping train, and referred Mr. Robb to Pearse in corroboration. Mr. Robb saw Pearse

at the same time, and asked him about this matter, and Pearse said, that on one occasion a "nigger" belonging to the sleeping car had asked him "to address the letter, but he did not like the looks of the thing, and he asked the respondent to do it." The respondent in his evidence stated that the first he knew of the difficulty was in the end of March (1869); that in the fall of 1868 he was going west, and when at Hamilton Mr. Pearse, the custom house (American) collector, said that a fellow had given him the envelope, and Pearse asked him to address it, and he did so. He further said he was suspended on the 1st April, and afterwards received the following letter :

"GREAT WESTERN RAILWAY.—NOTICE TO THE COMPANY'S
EMPLOYEES.

"It having come to the notice of the directors of the Company that an envelope was mailed at Hamilton containing four coupon tickets for passengers from Suspension Bridge to Detroit, which had been previously used, but not cancelled or returned to the audit office, in accordance with the regulations, and which envelope was addressed, in the handwriting of conductor Ténch, to a conductor on the New York Central Railroad, conductors and others are informed that conductor Ténch has been dismissed from the service of the Great Western Company.

GENERAL OFFICES, HAMILTON,
26th April, 1869.

"BY ORDER."

Mr. *Svinyard* was called by the plaintiff, and proved that he was the general manager of the appellants : that he had no reason to believe that this notice (also called the placard) was placed before the board of directors : that he had no doubt he took the responsibility of giving the notice : that it was his duty as general manager to issue such notices as this. His directions as to this notice, as far as he recollected, were for the notice to be placed in the Company's offices for the direction of the Company's officers. The instructions given by him were embodied in the following letter :—

“GREAT WESTERN RAILWAY TRAFFIC SUPERINTENDENT'S
OFFICE, HAMILTON, ONT., April 28th, 1869.

“DEAR SIR,—I wish you to go over the road and post up one of the accompanying circulars in each station master's office, and another in each booking office that is not part of the station master's office; also one in each conductor's circular book.

“You will be good enough to take the receipt of each station master that he has received one or more copies of this circular, as may have been left, and you will please inform them that these circulars are intended for the private information of employees only, and must on no account be allowed to be taken off the Company's premises. This will be your authority for so doing.

(Signed) “W. WALLACE. (Addressed) MR. McGRATH.”

McGrath proved that he put up the circulars, which were proved to have been printed and paid for by the appellants, according to these instructions. At that date there were about two thousand persons in all in their employ. It was proved that some few persons not employees of the appellants saw the placard at different stations.

Fay, a witness who lived at Utica, in the United States, proved that in October, 1868, he sold tickets for passengers over the Bridge, and he identified two tickets shewn to him by his stamps on them. He knew them by the office number and stamp. His “station is also No. 584 with the Assurance Company,” (the 6th October.)

Mr. *Muir* swore that there was nothing on these tickets to shew that they were used: that when a conductor would take one of these coupons from a passenger he would give his own check, and it would be his duty to punch it (the coupon); if he did not do so it could be used on the line again.

Pearse swore that the envelope was sealed when he first received it. The plaintiff in reply swore that he never saw these tickets until they were shewn to him in Court.

It is, I think, satisfactorily shewn by the evidence of Mr. Swinyard and of three others of the directors, that as a Board the directors did not authorize the publication of the placard ; but the chairman of the board gave evidence that the general manager could, as a matter of duty, have dismissed the respondent on his own responsibility. The board of directors have, at least tacitly, acquiesced in the dismissal. There can be no doubt in my opinion that the dismissal is proved to be the act of the defendants. If that be so, then I think that the notification of that dismissal to the two thousand employees of the appellants was an act done for their interest, and in their service; and for any reason I can discover to the contrary, they must be responsible if such notification was so given as to shew a wrongful act, with a wrongful intent.

But, I have heard no argument nor have I found any authority which shews that a notification, written or printed, to all the employees that one of them was dismissed, assigning the cause truly, would enable the party dismissed, even though he were charged with fraud towards his employers, to maintain an action ; for I think it clear such a communication is privileged.

Parke, B., in *Toogood v. Spyring*, 1 C. M. & R. 193; defines such communications as "Cases in which the occasion of the publication affords a defence in the absence of express malice."

And in *Taylor v. Hawkins*, 16 Q. B. 321, Lord Campbell says, "The rule is, that if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice: if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a non-suit or a verdict for the defendant." This judgment was approved in *Lawless v. The Anglo Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262.

To prove express malice in this case, it may be urged that the placard contains an untrue assertion, namely, that those coupon tickets had been previously used, but not

cancelled or returned to the audit office; the latter part being proved beyond doubt by their production and the account given of them. A careful examination of the evidence will, however, shew that enough appears to create a strong presumption that the former part of it is also well founded. Fay, a ticket agent, identifies two of these tickets as having been sold by him at Utica on the 6th of October, 1868, and at about 2 a. m. of the following morning the envelope containing these two tickets was handed to the respondent sealed, and he wrote the address on it at Hamilton; not more than a reasonable time for the travelling by rail from Utica to Hamilton had elapsed, and this fact affords some reason to believe that some person had used them; that is, after crossing the Suspension Bridge. But, at all events, if there is a misstatement in this particular, I fail to see that it affords any proof of express malice, either in Swinyard, as acting by the authority of the appellants, or in them as answerable for his acts in their service, and for their interests. I refer to the language of the Lord Chief Justice in *Spill v. Maule*, L. R. 4 Ex. 237. "Starting with the presumption of innocence in his (defendant's) favour, (because the communication was privileged,) we must assume that the defendant did entertain that view of the plaintiff's acts which induced him to believe, and honestly to believe, and say, that the plaintiff's conduct was dishonest and disgraceful * * * * All we have to examine is, whether the defendant stated no more than what he believed and what he might reasonably believe." And the Court upheld a direction to find a verdict for the defendant.

The putting up the placard in places where strangers saw it, was also urged as proof of express malice. If McGrath, as he swears, did according to the instructions in the letter to him, and he received no other instructions, I am at a loss to understand how this affords proof of express malice. There is no clear and distinct evidence that any placard was put up, except those put up by McGrath. I do not think that, because some few persons, three or four,

looked through a window or a door, and thus saw a placard where McGrath had put it, it would affect the case. Statements such as, "I saw it in the general waiting room here (St. Catherines), the end of April, 1869." "I saw it at Beamsville, at the station." "I think the station-master pointed it out to me in the general waiting room. It might have been in the office;" are not sufficient to go to the jury as proof of express malice, to deprive the defendants of the protection given by law to a privileged communication.

Publication so as to reach the company's numerous employees was lawful; the instructions lead to no conclusion that there was on the part of any one a desire to go beyond what was reasonable. The station-master's offices or the booking offices in the cases pointed out, appear to me proper places for the notice to reach those to whom it was addressed, and the caution which McGrath was directed to give the employees in regard to these placards, shews a careful intent to do no more than was necessary to convey the information to those who ought to receive it. McGrath swears he did what he was ordered and no more.

I think there was no evidence of express malice to be submitted to the jury. It is clearly the duty of the Court to decide whether there was any evidence upon which a verdict for the respondent could have been rationally founded. The propriety of the dismissal of the respondent from the appellant's service is not the question. We have to enquire whether the occasion of giving notice of that dismissal made such notice a *prima facie* privileged communication. I am of opinion that it did.

Then the enquiry follows: Did the facts proved relative to the giving of that notice afford any evidence against the appellants of express malice? I am of opinion that they did not. The elaborate judgment delivered by the late Mr. Justice Willes in the recent case of *Henwood v. Harrison*, L. R. 7 C. P. 617, treats the question of privilege and of the duty of the Judge who tries the cause in relation to that question in a clear and satisfactory manner. I have

endeavoured to take as my guide the principles enunciated in that case, so far as the difference of circumstances permitted, in arriving at the conclusions I have expressed.

I think the appeal should be allowed, and a judgment of nonsuit be entered in the Court below.

RICHARDS, C. J.—I think the authorities shew, that the “notice to employees” complained of as a libel in this case, if it had only been distributed amongst the employees of the Company, would be considered privileged.

The question which creates the difficulty in my mind is, whether the directing it to be pasted in certain books, and posted up in the offices of the Company where it could be, and was, seen by others than officers of the Company, was not in excess of the privilege, and whether the question ought not to have been submitted to the jury under the evidence.

The case of *Lawless v. The Anglo Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262, is an authority for the defendants as to communicating the notice to the employees of the Company. In giving judgment reference is made to the American case of *Philadelphia, Wilmington, and Baltimore Railroad Company v. Quigly*, 21 How. Sup. U. S. Court. Reports, p. 202. Hannen, J., said, p. 270, “I consider, with my brother Mellor, that the American case is directly in point, and adverse to the plaintiff’s argument,” (*i.e.*, as to circulating the report amongst the stockholders). “The latter part of it is applicable to circumstances which do not exist here; if, after the report had served its purpose by making known to the shareholders facts which it was their interest to know, the statement had been entered in the books of the Company to stand forever a record against the plaintiff, that he had had an accusation made against him, that might have been independent evidence of malice on the part of the Company.”

So here, the putting up of this notice in the offices of the Company in such places as they could be seen by others than employees, without its being shewn there was any

paramount necessity therefor, and for the pasting it in the books of certain officers of the Company, this was, in the language of Mr. Justice Hannen, independent evidence of malice to go to the jury.

I see no reason why a printed copy of the notice might not have been given to each employee to whom it was necessary or proper to communicate the fact of the plaintiff's dismissal, and the cause thereof.

The question is not now, whether the notice was sent to a class of the Company's employees to whom it was unnecessary to communicate such a notice.

As to the plea of justification, I think the jury would have been well warranted in finding for the defendants, and the only doubt I have is, whether the learned Judge should have directed a verdict for the defendants on the plea of justification. The only point on which there can be any doubt is, as to the allegation that the tickets had been previously used. The learned Judge thought that the jury should find on that fact, and they found against the defendants.

I think the evidence would warrant a finding the other way, and I think the reasonable inference from the facts proven was, that the tickets had been used. They were sold at Utica after 10 o'clock on the 6th October. They were no doubt sold to be used, and in the ordinary course of travel would be taken by the party purchasing them to some point west of the Suspension Bridge, and we find these tickets in the envelope directed by the plaintiff, which was probably put into the post office box at the railway station in Hamilton on the night of the same day. No motive was suggested for returning these tickets to the party to whom the envelope was addressed, and the reasonable one from the evidence given was, that the tickets having been used were intended to be sent to the Suspension Bridge to be sold over again.

If the return of the tickets had been for an honest purpose, it is probable that some one would have come forward at the trial to shew it.

If the rule had been to enter a nonsuit on this point, and the leave at the trial had been granted on this ground, I think the Court of Queen's Bench should have made the rule absolute; that not having been done, I fail to see how we can now interpose to relieve the defendants.

SPRAGGE, C.—The point in this case to which I have more particularly directed my attention is, whether, assuming that the paper which is the subject of the action is in its nature a privileged communication, the privilege is not lost by reason of its being exercised beyond the limits which the interests of the defendants rendered necessary.

The law in regard to communications privileged by the occasion upon which they are made, is laid down clearly and succinctly by Lord Wensleydale in *Toogood v. Spyring*, 4 Tyr. 595: "In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice."

This enunciation of the law, and the principle upon which it proceeds, has been approved and followed in subsequent cases.

Mr. Justice Byles said of it in *Whiteley v. Adams*, 15 C. B. N. S. 419, "The more that case is examined the more carefully and accurately the rule will be found to be expressed." And Chief Justice Erle in the same case, p. 414, speaks in substantially the same terms.

It is clear from the cases, that the communication which may be made by a person whose duty or interest warrants him in making it must, in order to the preservation of its privileged character, be made to a person, as expressed by

Lord Campbell in *Harrison v. Bush*, 5 E. & B. 348, "having a corresponding interest or duty,"

It is thus put in the judgment of Mr. Justice Willes in the late case of *Henwood v. Harrison*, L. R. 7 C. P. 623 : "It is clear that the privilege so established in respect of duty or interest, however necessary and valuable, must be exercised within the limits which the interest or duty indicates, and that, in many of the instances of privilege to which reference has been made, a public statement to an individual not having any interest in the matter might be held libellous. The statement must be such as the occasion warrants, and made to a person who is interested in receiving it."

Some cases upon this point are cited in the judgment. There is one not cited which affords a good illustration of this rule : *Force v. Warren*, 15 C. B. N. S. 806. A butcher supposed that a certain woman had stolen meat from his shop, and she being again in his shop he accused her of it. She denied it, and went to a magistrate in order to take proceedings against the butcher. Upon this the butcher meeting with a person whom he supposed to have been in the shop at the time, said to him, "They have taken proceedings against me; you were in the shop; she stole a piece or two of meat; did you not see her take it?" The woman brought an action against the butcher, and what he had said as above quoted was held to be privileged, Chief Justice Erle saying, "He had an interest in making inquiry of a supposed eye-witness in order to protect himself, and also a public duty to substantiate a criminal charge." The action was also brought for other words used upon another occasion. A friend of the person accused went to the butcher and asked him if he accused Margaret, the plaintiff, of stealing a piece of meat. His answer was; "Yes; and I believe it to be true." As to the words spoken upon this occasion the Chief Justice said, "I cannot see that there was any privilege. The defendant was not acting in pursuance of either interest or duty in repeating the charge to her. * * I do not think the defendant was excusable

in regard to this upon either of the grounds upon which the doctrine of privileged communication rests." And with this the rest of the Court concurred.

There is also an American case, *Philadelphia, Baltimore, & Wilmington Railroad Co. v. Quigley*, 21 How. Sup. U. S. Court, 202, which is very much in point. It was held to be within the course of business of the president and directors of a railway company to investigate the conduct of their officers and agents, and to report the result to the stockholders; and that such report was privileged; and the same was held in England in *Lawless v. The Anglo Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262. In the American case the report, which contained matter that, but for the privilege, would have been libellous, was, besides being sent to stockholders, entered in a book of the Company which was preserved among the books and papers of the Company, and this was held to be in excess of the privilege. The case was referred to with approbation by Mr. Justice Mellor, in *Lawless v. The Anglo Egyptian Cotton and Oil Co.*, upon the principal point—the other point not arising in the English case—but in reference to that other point, Mr. Justice Hannen says, that it is applicable to circumstances which do not exist in the case then in judgment; and adds, "If after the report had served its purpose by making known to the shareholders facts which it was their interest to know, the statement had been entered on the books of the Company to stand for a record for ever against the plaintiff that he had an accusation made against him, that might have been independent evidence of malice on the part of the Company."

There is certainly good sense as well as common justice in confining the exercise of the privilege within the limits indicated by interest or duty; for this defence, taken by itself, assumes that the matter is not only libellous, but untrue; and puts it upon this, that though untrue the publication of this matter should be excused, because the party uttering the libel or slander had an interest or duty which warranted the publication.

To apply it to this case. It was to the interest of the Company to inform the conductors on the line that one of their number had been dismissed for the misconduct set out in this paper. The number of these was some sixty or seventy; the number of engine drivers was about the same. It may be conceded that the Company was warranted in giving the like information to them, and to station masters and to some others who would be in the habit of receiving instructions as to their duty, and whose duties were of such a nature that they might defraud the Company, as it was intimated that Mr. Tench had done. I say that this was intimated by the paper; not that he was dismissed for a disregard of regulations, an offence in the nature of a breach of discipline, but for dishonesty.

The letter of instructions implies a consciousness on the part of the officers of the company by whom it was sent, that this charge of misconduct, which had entailed the disgrace of dismissal, ought not to be made *public*, but that the information should be limited. If limited, it ought surely to be limited by the exigencies of interest or duty. I have named such classes of the company's servants as I think it might fairly be distributed among. They might be between two and three hundred in number; supposing there were 500, was it not practicable, nay easy, to put this circular in envelopes and distribute them among 500 employees, with instructions, if the company thought it necessary, that conductors should read it to brakemen and station-masters, to guards, baggage-masters, and others employed at stations.

If the company had published this paper in the public journals of the day, or had caused it to be posted up in the waiting rooms of stations, there could, I apprehend, be no doubt that it would have been a circulation of the paper beyond what was warranted by the occasion; and that it would have been the duty of the Judge to tell the jury that the privilege was lost by reason of the excess in its exercise: that, to borrow the language of Erle, C. J., in *Force v. Warren*, 15 C. B. N. S. 808, the defendants "were

not acting in pursuance of either interest or duty in repeating and circulating in that way the charge contained in the paper; that the defendants were not excusable in regard to this upon either of the grounds upon which the doctrine of privileged communication rests."

There are degrees in the excess in which the limit rendered necessary by duty or interest may be overstepped. I have purposely put an extreme case, as a test; but there can, I apprehend, be no doubt that any excess—any excess I mean that is real and substantial—takes the case out of the privilege. The excess in *Force v. Warren*, 15 C.B.N.S. 808, was by no means extreme.

In my judgment there was excess in this case; and to a much greater degree than in *Force v. Warren*, 15 C. B. N. S. 808, or in the American case to which I have referred.

I have indicated what, in my opinion, would have been sufficient to answer all the legitimate purposes of the occasion. Much was done beyond this in the circulation of the paper in question. It was posted up, and kept posted up in some places for weeks, and in others for months, in offices of the company called private, but to which others than servants of the company obtained access, and there saw and read it, and in some of those offices in a conspicuous place, where it could be seen and read from the wicket at which the public purchased their tickets.

We cannot tell how wide a circulation the contents of the paper obtained in this way, for though the servants of the company were enjoined to keep it to themselves, the general public, who obtained knowledge of its contents, were under no such restraint.

It seems to me, that those who are about to speak or write of others that which is defamatory, and who may have to rely upon privilege for their protection, should be especially careful to confine their speech or writing to the limit demanded by the occasion. If they are prepared to establish *the truth* of what they say or write, they can stand upon that; but when they are put to say, "this may be untrue, but though untrue is still privileged," the posi-

tion of the utterer of the defamation, and of the person affected by it, is widely different.

If the utterer would only consider beforehand that which he is obliged to say afterwards, and consider how cruel a wrong he may be inflicting, he would, of his own accord, unless actually and positively malicious, do that which in my opinion the law requires of him, most carefully confine himself within the limits demanded by the occasion.

I do not believe that Mr. Swinyard, or any other officer of the company, was actuated by malicious motives in what they did; and it is not necessary that they should be, in order to the plaintiff's right of action, for, as was said by Sir William Erle, in *Whiteley v. Adams*, 15 C. B. N. S. 414, "Defamation, pure and simple, affords presumptive evidence of malice." The learned Chief Justice goes on to say, "That presumption may be rebutted by shewing that the circumstances under which the libel was written, or the words uttered, were such as to render it justifiable. The rule has been laid down in the Court of Exchequer, and again lately in the Court of Queen's Bench, that if the circumstances bring the Judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then, if the words pass in the honest belief on the part of the person writing or uttering them, he is bound to hold that the action fails."

The case, or at least this branch of it, seems to me to depend upon three very plain propositions: 1st, Defamation by itself affords presumptive evidence of malice. 2nd, The presumption of malice may be rebutted by shewing occasion of duty or interest, and then it becomes privileged; but, 3rdly, the privilege must be exercised within the limits which the duty or interest indicates. It is because, in my judgment, the privilege has not in this case been exercised within those limits, that I hold the defendants to be liable, and agree with the judgment of the Court of Queen's Bench.

I agree that it was the province of the judge to say whether the paper in question was within the rule of privileged communications, and also whether there was excess in the exercise of the privilege. If there had been any evidence of express malice, it would have been different.

Taking the view of the case that I do, my opinion of course is that the jury should have been told, that there was excess in the exercise of the privilege; and that on that question being left to the jury, the charge of the learned Judge was *too favourable* to the defendants.

Upon the other grounds upon which judgment was given in the Court below, I concur in the judgment of that Court.

HAGARTY, C. J. C. P.—We are to consider the point as it was presented to the learned Judge at the trial on the motion for nonsuit.

The communication by the Company to their servants was undoubtedly privileged. The burden of proving any excess of the privilege, amounting, if in the case of an individual, to express malice, was on the plaintiff.

Before anything is left to, or found by the jury the Judge has to see what the alleged libel was, and what was done with it.

It is said to bear two constructions—one charging a breach of orders merely by plaintiff and his consequent dismissal; the other imputing a misdemeanor. The Judge has to consider the nature of the communication, and, as in *Spill v. Maule*, L. R. 4 Ex. 232, to consider “that the defendant entertained that view of the plaintiff’s acts which induced them to believe, and honestly to believe, and to say,” what they did say of the plaintiff.

In the “milder sense,” at least, of the hand-bill, I cannot see anything improper in the defendants directing it to be put up in their offices as a direction and warning to their own servants. I am strongly of opinion that there was nothing in the hand-bill which was not warranted by the matters in evidence.

Granted the privilege, I cannot see how the Judge could say there was any evidence to prove malice or destroy the protection.

The manner of publication is all that is relied on by the plaintiff. The defendants, he says, need not and should not have put it up in their offices where outsiders could, perhaps, read it. This, to the extent it was done in this case, seems somewhat analogous to the alleged excess in *Spill v. Maule*, L. R. 4 Ex. 232, in characterizing the plaintiff's conduct as "dishonest and disgraceful," or the language of the Bishop, in *Laughton v. Bishop of Sodor and Man*, 21 W. R. 204. There it was insisted the language was unnecessarily libellous and wholly beyond the privilege. Here it is urged that the places where the hand-bills were posted were unnecessarily public, and so beyond the privilege.

We must be careful not to leave the vitally important doctrine of privilege wholly at the mercy of a jury. In the language of the Privy Council case: "To submit the language of privileged communications to a strict scrutiny and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would, in effect, greatly limit, if not altogether defeat, that protection which the law throws over privileged communications."

The nearest case in its facts is *Jackson v. Sir R. Mayne*, 19 L. T. N. S. 399, where plaintiff's dismissal and the alleged cause was put upon the police sheets, and read to all the members of the force at the different stations. Keating, J., said he would hold for the present that it was not privileged. The jury could not agree and the point was not further, discussed. I think on the facts before Sir H. Keating I should have taken the same course.

In the emphatic language of that most learned personage, the late Mr. Justice Willes, in *Henwood v. Harrison*, L. R. 7 C. P. 628, "It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon every other question of law if we were to hand over the decision of privilege or no privilege to the jury. * * * In actions of libel, as

in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the Court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded."

Now the learned Judge trying this case would surely consider, when the motion for nonsuit was made, that the evidence clearly warranted everything contained in the hand-bill; if so, and the communication thereof to the Company's servants clearly privileged, how could he then hold, as a matter of law, that the putting it up in their offices for the information of their servants was an excess?

Viewing it, as I think I must, as at the time the nonsuit was asked, I think the motion should have prevailed.

I fear that evil consequences must follow from leaving such a thing always to a jury. The logical result must be that, in a matter of some legal nicety, the point cannot safely be trusted to the Judge, but must be left to the acumen of a jury.

As in the case of the existence or non-existence of probable cause, where there is no dispute as to facts, the Judge must decide the point. In many cases, as in a case like the present, the question is one of degree. A little more or a little less may turn the scale. The Judge holds, as a matter of law, there was reasonable cause. In the libel suit he holds there was or was not excess over the admitted privilege.

Had the hand-bill directly charged the plaintiff with being a thief or an embezzler of moneys, or had the evidence shewed a wholly unnecessary publication, such as the inserting it in a newspaper, or pasting it on gates and fences, or placing it at the aperture where the public get railway tickets, &c., &c., I can fully understand a Judge considering that he should leave the question of malice or want of good faith to the jury. With the evidence of the plaintiff and the temperate language of the hand-bill before him, with the directions as to the mode of publication, I think he should have held that the privileges were not exceeded.

The very discussion raised on this point and the apparent

difference of opinion tend strongly to lead my mind to the conclusion that any difficulty felt by a Judge in deciding such a point must be felt with ten-fold power by a jury.

WILSON, J.—The only part of the case on which it is necessary to make any observations, is upon that part of it relating to the alleged privilege of the publication.

It was contended at the trial, that it was privileged because it was a communication made for the information of the defendants' employees.

The learned Judge directed the jury, that if the placard had been handed to the employees, or enclosed in an envelope for their own information as a warning, &c., it would have been privileged; but as the instructions were to put the notices up in the offices mentioned, &c., he would leave them to say whether in giving these instructions the general manager was acting *bonâ fide* and honestly, uninfluenced by malicious or improper motives, or with a view to injure the plaintiff. If, in their opinion, he acted *bonâ fide*, to find for defendants; if otherwise, for the plaintiff.

There was no objection taken to this charge by the defendant's counsel for anything alleged to have been wrongly stated, or wrongly omitted to have been stated; and the motion made in term was to enter a nonsuit or a verdict on the leave reserved on the objections taken for a nonsuit.

The directions to the servants of the Company were to "post up one of the accompanying circulars in each station master's office, and another in each booking office that is not part of the station master's office; also one in each conductor's circular book."

Was this kind of publication, in places where it was freely seen by others than the employees, justified?

I think the charge might, perhaps, have gone somewhat further than it did, or I should say might have been more specific. The learned judge said, that if the instructions to put up the hand-bills in the Company's offices before mentioned were given *bonâ fide*, &c., to find for the defendants. The directions might have been, that although the putting

up of the circulars in these offices may have enabled some others than the employees of the Company to see them, yet if the purpose for which they were put up was only for the information of the employees, and if it were the most speedy and convenient way of communicating it to them, and if it would only be an occasional person who happened to have business to transact in the station master's office, or one of the other offices, or only a very sharp or inquisitive ticket buyer while at the wicket, who would be likely to see them, that would not be an improper publication of the hand-bill, and would not take away the privilege.

But, in determining that question, the jury might also have been told that they should take into consideration the ease with which the placards could be seen from the wicket or elsewhere, and the nature of the place where they were put up, such as in a general waiting room, or even in the station master's office, if it were a place of very common resort for the customers of the Company. For if the placard could be too easily seen by any one not in the Company's service, or if they were put up in too public or in too conspicuous a place, and more so than it was necessary for the purpose of affording the proper information to the Company's employees, and so that others than the employees would necessarily and generally see them, that would be evidence of a kind and degree of publication which would remove the protection and benefit of privilege from the Company.

On so specific a charge as that, if the jury had found for the plaintiff, the Court could not on this evidence have entered a nonsuit.

Now the charge was not objected to. The evidence which would have warranted a finding for the plaintiff on the most explicit charge is still there; and it cannot lessen the plaintiff's right to a verdict that the defendants' counsel did not ask the charge to be amended or given otherwise than as it was given, and does not now complain of the charge, or ask for a new trial in order to have a fuller or a different charge given to another jury.

The charge, in effect, fairly submitted the case to the jury, and it must be so considered now.

The question then is, "Upon the evidence should the Judge or the Court in law have nonsuited the plaintiff?"

I am clearly of opinion that a nonsuit could not properly and should not have been entered.

In *Finden v. Westlake*, M. & M. 461, the defendant published a hand-bill offering a reward for certain bills of exchange lost from his possession which were described in the hand-bills, and in which he stated, "and which Mr. Westlake believes to have been embezzled by his clerk." The plaintiff was the clerk. Tindal, C. J., directed the jury in part as follows: "If you think it (this publication) was made in the opinion that it was necessary either for the purpose of justice, with a view to the discovery and conviction of the offender, or for the protection of the defendant himself against the liability to which he might be exposed on the bills, and that these, or either of these, were the defendant's only inducements to the publication, you may give him a verdict on the counts for the libel. It does not seem to me, however, that the libel will bear that construction; the introduction of any mention of the plaintiff could not be necessary for the protection of the defendant, or for the information which he might wish to give to bill-brokers or any other persons to whom the bills might be passed, for the description of the bills was all the information wanted for this object: and it could not be necessary for the purposes of justice, for the plaintiff was the person whom the defendant suspected, so that he did not require information as to the supposed criminal; nor had the plaintiff absented himself so as to render it necessary to mention him with a view to his apprehension."

It is not actionable to publish of the plaintiff as follows: "Notice.—Any person giving information where any property may be found belonging to Henry Gompertz, a prisoner in the King's Bench prison, but residing within the rules thereof at 3, 4, and 5, Portland Place, Borough Road, shall receive five per cent. upon the goods recovered

for their trouble, by applying at Mr. Levy, Fetter Lane, Fleet street?" *Gompertz v. Levy*, 9 A. & E. 282. See also *Stockley v. Clement*, 4 Bing. 162.

Blackham v. Pugh, 2 C. B. 611, is like this case in stating a fact which was not true, but which the defendant believed to be true, and was interested in stating.

In *Brown v. Croome*, 2 Stark. 297, it was held that an advertisement in a public newspaper strongly reflecting upon the character of an individual who has been declared bankrupt is libellous, although published with the avowed intention of convening a meeting of creditors for the purpose of consulting upon the means proper to be adopted for their own security if the legal object might have been obtained by means less injurious. Lord Ellenborough, C.J., said, p. 301, "If it could be shewn that an advertisement in the Gloucester paper was the only possible way of communicating notice of the circumstances, it might be sufficient to vindicate the mode. * * The defendant made no progress in his defence unless he could shew that such a publication was the only effectual mode of convening the creditors. * * The want of proper caution had rendered the publication actionable, as being published to the world at large; this made an essential distinction which applied to all the cases."

All of the cases of publications being made for the benefit of those interested in the matter charged as libellous invariably assert the law to be, that the publication of the matter to others than to those who are interested, is an excess and abuse and a valid ground of action:—as in *Stockdale v. Hansard*, 9 A. & E. 1; *Lawless v. The Anglo Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262; *Henwood v. Harrison*, L. R. 7 C. P. 606, and in many other cases.

It is for the Court alone to decide whether a case of privilege has or has not been proved, and upon which a rational verdict for the affirmant can be founded, per Willes J., in *Henwood v. Harrison*, L. R. 7 C. P. p. 628.

The learned Judge could not and did not say a case of privilege was fully sustained. It was made out, if the pub-

lication were not carried beyond the proper limit to be allowed in such cases. The Judge could not say it was kept within the proper limit upon the evidence given. He had to leave it to the jury to pronounce upon, subject to a proper direction. That direction has not been complained of; the evidence or its effect has not been impeached; and, as it stands, it is such evidence as sustains, and, in my opinion, justifies the verdict. I cannot presume to say that the jury should and must have found a verdict for the defendants.

A very wide and public circulation may be given to that which would be *primâ facie* a libel if it can be shewn that such general publication were required for the purpose of defending the reputation of the publisher.

One who is assailed in the public press may answer in the like manner; and, if it be necessary in his own vindication, to speak strongly or libellously of his assailant, and the language used is not in excess of what was proper for that purpose; he is protected for all he has said.

The attack made upon one may be of so public a character, that the most public way of answering or refuting it must be allowed to the person injured.

But it cannot be said, that because two people have had angry and injurious words in a private room, that one of them is to be permitted to publish an answer by hand-bills reflecting offensively on the other; or, because a master has dismissed a servant for alleged dishonesty, that he may also send a notice of it to the newspapers, or may placard it about his place so that all who go there may see and read it.

And unless the rule be carried that far, the appeal should be dismissed. If it be carried that far, unquestionably the appeal should be allowed.

GWYNNE, J.—There were three points made on behalf of the appellants. 1. That there was no evidence that the defendants had authorised the publication of the hand-bill. 2. That the act of the general manager was not in such a matter within the scope of his duty, so as to bind the defen-

dants and make them answerable for his act. 3. That the communication was privileged in its matter and mode of publication.

In *Edwards v. The London and North Western R. W. Co.*, L. R. 5 C. P. 445, Montague Smith, J., says, p. 450, "A superior officer may have a right to exercise all the power which the company would have under the circumstances." And Brett, J., says, "Authority may be implied from the ordinary way adopted by the company in carrying on its business."

It seems to be necessary for the efficient conduct of the business of railway companies, that there should be some superior officer clothed with authority to deal on the company's behalf, to control the management of the affairs of the company.

That this necessity is recognised by the defendants sufficiently appears from the fact that the ordinary mode adopted by them for carrying on their business is through an officer having a seat at the board, and styled "General Manager of the Company."

It also appears in evidence, that it was part of the duty and business of such manager, under the circumstances appearing in evidence, to dismiss the plaintiff from the company's service on his own responsibility, without reference to the Board, and also to issue a notice such as that containing the alleged libel for the information of the other servants of the company. This being so, it is I think, clear,—upon the authority of *Limpus v. The London and General Omnibus Co.*, 1 H. & C. 526; *Allen v. The London and South Western R. W. Co.*, L. R. 6 Q. B. 65;—and indeed of all the cases, that the company are responsible for a libel contained in a communication published by the general manager of the company, within the scope of his authority in fulfilling the duties which as general manager of the company he had to perform, unless such publication be privileged; and as there was abundant evidence to go to the jury of the fact that the publication of the alleged libel did come within the scope of Mr. Swinyard's general authority as

manager of the company, there can be no nonsuit for anything in the 1st or 2nd points made on behalf of the defendants.

It remains to be considered whether the defendants are *prima facie* exempt from liability by reason of the alleged libel being privileged. If they are, I agree that there is no evidence whatever of actual or express malice upon which a verdict in favor of the plaintiff upon that ground could be supported. Indeed if the plaintiff could only succeed in displacing the privilege by establishing *actual* malice, if that actual malice be the private ill-will and spite of an individual servant of the company, a different question might arise, as in *Limpus v. London & General Omnibus Co.*, 1 H. & C. 526, namely, whether the charge to the jury should not be to the effect that if the conduct of the servant was induced by his own private spite to the plaintiff, which he was gratifying, the company would not be responsible for such malice, but the individual alone should be answerable therefor.

I agree also that, as laid down by the Court, Willes, J., pronouncing the judgment, in *Henwood v. Harrison*, L. R. 7 C. P. 626, citing *Wason v. Walter*, L. R. 4 Q. B. 73, it is for the judge to determine as matter of law whether the occasion of the publication was or not privileged.

But, granting the question of privilege or no privilege to be a question of law for the Judge to decide, it is upon the existence of certain facts that the question of law arises and depends. What these facts are, Willes, J., states in *Henwood v. Harrison*, L. R. 7 C. P. pp. 622, 623, quoting Parke, B., in *Toogood v. Spyring*, 1 C. M. & R. 181: "Communications fairly warranted by any reasonable occasion or exigency, and *honestly* made, are protected for the common protection and welfare of Society, and the law has not restricted the right to make them within any narrow limits."

So that it must be assumed, admitted or established, that the protection was *honestly* made before the question of

privilege or no privilege can be decided by the Judge, as is the case also often where a question as to the existence of reasonable or probable cause arises. In *Whiteley v. Adams*, 15 C. B. N. S. 392, also cited in *Henwood v. Harrison*, the rule was stated to be that, "A communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has or honestly believes he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminary matter which without this interest would be slanderous or actionable." Commenting upon this rule the learned Judge adds, "It is clear that the privilege so established in respect of duty or interest, however necessary and valuable, must be exercised within the limits which the interest or duty indicates, and that in many of the instances of privilege to which reference has been made a public statement to an individual not having any interest in the matter might be held to be libellous. The statement must be such as the occasion warrants, and made to a person who is interested in receiving it. The mere fact of the presence of a person uninterested has been held to be insufficient to take away the privilege, as in many of the cases as to master and servant; but the statement to a person wholly uninterested would, in such case, be defamatory; as, for instance, in the case of a joint stock company the publication of a defamatory report of the auditors of the company to the shareholders whom alone it interested, might be privileged, while its general publication might be libellous: *Lawless v. The Anglo Egyptian Cotton and Oil Co.*, L. Rep. 4 Q. B. 262, In others of the cases referred to, the publication has been held to be privileged, though made in the form of a handbill, or a statement in a newspaper, where the subject was one in which the public had an interest; and this was remarkably the case in *Wason v. Walter*, L. R. 4 Q. B. 73, where the subject received the most elaborate and satisfactory consideration."

In some cases the existence of privilege depends upon

the question whether or not an article complained of as a libel is a fair commentary of a work given to the public. In that case it is plain that before the Judge can be called upon to decide as a point of law the question of privilege or no privilege, the facts upon which that point of law depends, if not admitted, must be found by the jury. Upon these facts however, if there be no contradiction, if the evidence be all one way, if there be nothing to warrant a doubt as to whether the facts upon which the point of law depends exist or do not, then there can be nothing to leave to the jury, and the Judge should, as I conceive, decide the point of law, as upon undisputed or admitted facts. Now the questions of fact upon which the point of law, namely, privilege or no privilege, depends in this case are, first, is the statement complained of as libellous of such a nature in its matter as the occasion warranted: that is to say, did Mr. Swinyard honestly believe that in the discharge of his duty as manager of the company, it was his duty to communicate, or that it was the interest of the company that he should communicate, to the servants of the company the cause of the plaintiff's dismissal, in the terms contained in the hand-bill complained of; and, 2nd, was the mode of publication reasonably such as to confine the communication to the servants of the company, or was it calculated unnecessarily to convey the communication to persons not in the service of the company.

As to the first point, Mr. Swinyard, who was called by the plaintiff, swore, that it was his *duty* as manager to issue the notice complained of: that he gave instructions in writing as to the mode of its publication, which were produced, signed W. Wallace, addressed to one McGrath, a servant of the company.

Mr. Swinyard also swears, that the object of the circular was to make known to the employees of the company the consequences that would follow if they committed the same irregularities. As to the matter of the circular it is shewn by the evidence of the plaintiff himself to be true in every particular, save one only as to which he does not profess to

be able to speak, and as to that point the evidence as to it is such that no rational inference could be drawn other than that it was true also. The plaintiff does not profess to impute to Mr. Swinyard any want of *bona fides* in his conduct in the matter; indeed in a letter from the plaintiff after his dismissal to him, which was produced at the trial, the plaintiff speaks of him as a person, "who has ever shewn an upright and unbiassed bearing towards *all* those over whom he presides, and as one who had always treated the plaintiff well and justly." In short there was no evidence whatever to justify a doubt as to the *bona fides* of Mr. Swinyard. So that, in so far as the *matter* of the circular is concerned, and the *bona fides* of the company's manager in issuing it, the question of privilege or no privilege was ripe for the adjudication of the Judge, without any previous reference of any question of fact upon those heads to the jury,

The only question, therefore, that exists in this case is solely, whether the mode in which a communication *bonâ fide* and honestly intended to be communicated to the servants of the company, and which it was the duty of the company's manager to communicate to them, has been so published to persons not interested in the communication as to deprive the defendants of their privilege.

The Court of Queen's Bench was of opinion, that the hand-bill being affixed in the private offices of the company did not deprive the defendants of their privilege. In this view I concur. I think such a publication should no more divest the defendants of their privilege, although some persons dealing with the company might occasionally have access to such offices, and although a person peering through the wicket where tickets are sold, or through the door of the offices for the purpose, might see the circular, than an honest communication of the matter of the hand-bill to a servant or servants of the company in the presence of a stranger or strangers; but the Court was of opinion that the privilege was lost by reason of publication in other parts of the premises of the company than in those offices. I

must say that after a careful perusal of the evidence, I do not think that it supports this view. Mr. Lawder, who is the only witness upon that subject, admits that he may have been mistaken in saying he saw it elsewhere than in the office. The plaintiff himself did not allege that, or rest his case upon the ground that it was so published.

Upon the whole, I am of opinion, that as there appears to be no doubt of the honest intention of the manager to confine the publication to the officers and servants of the company, and his instructions were limited to affixing it in the private offices, the evidence of a more extensive publication, [in excess of the privilege, should be most definite and indisputable before the defendants should be deprived of their privilege. Here I think there is no evidence of any publication beyond that limited and directed by the instructions of Mr. Swinyard.

I concur therefore that in this case a nonsuit should have been granted upon the ground of privilege.

GALT J., concurred in the judgment of Draper C. J. of Appeal.

STRONG, V. C.—The instructions given by Mr. Swinyard to Mr. Wallace, the defendants' traffic superintendent, the directions by the latter to Mr. Robb, the detective, the writing and printing of the placard, and the affixing it by Mr. McGrath in the offices of the Company, were all acts "within the business and employment" of the several officers named; and it is therefore plain, on well established principles, that the corporation are liable for the acts of their officers, if these acts have been the cause of any legal injury to the plaintiff: *Lawless v. The Anglo-Egyptian Cotton and Oil Company*, L. R. 4 Q. B. 262; *Philadelphia, Wilmington, and Baltimore Railway Co. v. Quigley*, 21 Howard (U. S.) 202.

The important question, however, which arises and must be decided on this appeal is, as to whether the posting up of the hand-bill complained of was not a communication

by the Company to its servants made in such a manner as to bring it within the rules as to privilege. From the evidence of Mr. McGrath it appears that this hand-bill was affixed only in the private offices of the Company, namely the ticket and station masters' offices. It was also put in books kept for the information of conductors called the "Conductors' Circular Books."

Judge Lawder speaks of having seen it in the public waiting-room at St. Catharines; but the plaintiff's own evidence shews that this must not be taken to mean that the hand-bill was itself put up in the public room. He says: "The placard I saw in the ticket office was not in the public room, but in the office itself. If I looked through the window I could see it; while buying a ticket I could see it; it was about fifteen feet from the window. It was in the same position at the St. Catharines office, except there was a jag in which it was placed." I think it important to refer particularly to the evidence, because, in the view which I take, the distinction between publication of the hand bill by putting it up in the public waiting-room and the affixing it in the private offices only constitutes the turning point of the case, and because I gather from the judgment of the Court below that it was there assumed that the placard had been publicly exhibited in the ordinary passengers' waiting room, which, as I have said, appears from the plaintiff's own evidence not to have been the case.

The question therefore arises whether what is thus proved to have been really done constitutes a privileged communication.

This question was entirely one for the Judge at the trial to decide, and if the Judge ought to have held the defendants privileged there was no question for the jury, and the plaintiff should have been nonsuited, for there could have been no pretence for saying that there was the slightest evidence of express malice.

In *Whiteley v. Adams*, 15 C. B. N. S. 418, Erle, C. J., says: "Judges who have had, from time to time, to deal with ques-

tions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty or what amount of interest will afford a justification; but all are clear that it is a question for the Judge to decide." In *Lawless v. The Anglo Egyptian Cotton and Oil Company*, L. R. 4 Q. B. 268, Mellor, J., says: "The communication in this case is *prima facie* privileged, and there being no evidence, intrinsic or extrinsic, of malice, that question was very properly not left to the jury." *Somerville v. Hawkins*, 10 C. B. 583, and *Taylor v. Hawkins*, 16 Q. B. 308, are to the same effect. The point has also been expressly decided in the recent case of *Henwood v. Harrison*, L. R. 7 C. P. 626, and in the Privy Council in *Laughton v. The Bishop of Sodor and Man*, 21 W. R. 204. See also *Spill v. Maule*, L. R. 4 Ex. 232.

In the face of these authorities I cannot regard the case of *Stace v. Griffith*, L. R. 2 P. C. 420, as negating this doctrine. It is true that Lord Chelmsford there seems to lay it down broadly that in every case where the question of privileged communication is raised the question of *bona fides* must be left to the jury. When however, there is nothing in the contents of the writing itself shewing malice, and no collateral proof of any actual malicious intention, I must regard the law as settled that there is no case for the jury, and what is said in *Stace v. Griffith* to be the rule must either be considered as overborne by the weight of authority, or is to be taken as only applicable to cases in which there is some evidence of malice in fact.

In deciding this preliminary inquiry as to privilege, the Judge, to a certain extent, has to draw inferences of fact, the question being compounded of both law and fact; but this is no more than he has to do in the case of an action for malicious prosecution, where the question of want of probable cause is one for the Judge, who in this instance, as Lord Westbury points out in the case of *Lister v Perryman*, L. R. 4 H. L. 562; supersedes the functions of the jury as sole judges of fact.

Then was this communication privileged? In *Harrison v. Bush*, 5 Ex. 244; it is laid down that a "communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has or honestly believes he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminary matter which without that privilege would be defamatory and actionable."

That a communication by the defendants to their officers and servants of the fact of the plaintiff's dismissal, and of the circumstances which induced it, is within this definition, cannot be questioned. The case of *Somerville v. Hawkins*, 10 C. B. 583, being precisely in point, puts an end to all doubt on that head.

This brings us to the enquiry whether the mode which the defendants adopted of making the communication to their officers and servants was under the surrounding circumstances, so fair and reasonable that all implication of malice is rebutted. Mr. Wallace, the superintendent, states that there are sixty or seventy conductors, and sixty or seventy engine drivers, and in all 2,000 men in the employ of this railway company. To all these persons the defendants had a right to communicate the facts stated in their placard without making themselves liable to the plaintiff. Could a more reasonable, and I will say, as regards the plaintiff, a more considerate, mode of imparting this information have been adopted by the defendants than that which they resorted to? The use of a printed notice was from the number of the persons to whom the defendants had a right to make the communication almost a necessity; certainly it was reasonable and convenient. The printing therefore was perfectly justifiable; and in what other manner could the printed matter have been brought to the notice of the company's employees, otherwise than by affixing these hand-bills in the private offices of the company, or sending a copy to each of the persons to whom the defendants could rightfully have communicated it in the form of a circular notice.

That the defendants could lawfully have circulated printed copies amongst their servants is abundantly proved by the case of *Lawless v. The Anglo Egyptian Cotton and Oil Company*, L. R. 4 Q. B. 262, already quoted. Then was not the plan of putting up the bills in the offices a mode of proceeding much more favorable to the plaintiff than would have been that of distributing 2,000 printed circulars amongst the servants of the company, which might, without rendering the company liable, have been afterwards handed about by those to whom they were addressed to the prejudice of the plaintiff.

It being the right and duty of the defendants to make this communication, I am of opinion that it was impossible they could have adopted a mode of doing it less likely to be injurious to the plaintiff than that to which they resorted.

It was argued that by placing the placard in offices from which the public were not wholly excluded, and in some instances in such a position that they could be seen by persons in the public waiting rooms, the defendants exceeded their privilege.

The principle, however, of the authorities is, that if the communication is made in a reasonable manner, having regard to the circumstances in which the defendants are placed, it makes no difference that in imparting the information to persons within the privilege the alleged libellous or slanderous matter or words is also communicated to others not so included.

Mr. Starkie, at page 257, thus states this principle: "In the case of a master giving the character of a discharged servant, it is not essential to the protection of such a communication that no one should be present but the person interested in the enquiry. If made with honesty of purpose to a party who has any interest in the enquiry (and that has been very liberally construed,) it is privileged." See also *Toogood v. Spyring*, 1 C. M. & R. 194; and *Lawless v. The Anglo Egyptian Cotton and Oil Company*, L. R. 4 Q. B. 262.

Indeed in the late case decided in the Privy Council in *Laughton v. The Bishop of Sodor and Man*, 21 W. R. 204, this principle has been carried to an extent which seems to make the most open and notorious publication by means of a newspaper justifiable on the ground of privilege, and that case goes far beyond what is required for the defendants' protection here.

The defendants in the present case have, I conceive, a right to say that they adopted a reasonable mode of making a communication to their servants which it was their duty to make, and that they are not to be deprived of the protection which the law throws around them in doing so merely because third persons might also acquire a knowledge of their statements.

I think the judgment of the Court of Queen's Bench should be reversed and a nonsuit entered.

BLAKE, V. C.—I am of opinion that the act complained of was one that came within the scope of the duty of the general manager of the defendants. Mr. Swinyard in his evidence says, "I have no doubt I took the responsibility of giving the notice. It was my duty as general manager to issue such notice as this;" and there is no evidence to shew that Mr. Swinyard, was mistaken in the view of his powers on that head. It would seem that the matter was one peculiarly within the province of the person in whose hands lay the general management of the road, and the authorities and the reasons given in the Court below justify the conclusion arrived at upon this ground of the appeal.

I agree that the clause limiting to six months the period within which certain actions are to be brought against railways does not apply to such a case as the present.

The authorities seem to lead clearly to the conclusion, that it is for the Judge to say whether the communication complained of is privileged; and if the Judge finds this point in favor of the defendant, it is his duty further to find whether the expressions are so far beyond what the occasion calls for as to raise a presumption of actual malice,

and to say whether the privilege has been exercised within the limits afforded by the occasion ; or, in other words, whether there has been any excess beyond the privilege in the mode of dealing with the communication.

In *Whiteley v. Adams*, 15 C.B.N.S. 418 the law is thus laid down, "Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification : but all are clear that it is a question for the Judge to decide."

In *Henwood v. Harrison*, L. R. 7 C. P. at page 628, the rule is thus laid down : "It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury, according to their individual views of religion or policy, might hold the Church, the Army, the Navy, Parliament itself, to be of no national or general importance, or the liberty of the Press to be of less consequence than the feelings of a thin-skinned disputant. In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the Court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded."

The Court will not infer malice : *Harrison v. Bush*, 5 E. & B. 344 ; and where privilege exists the burden of proof of actual malice rests upon the person who complains. If there is no evidence of such malice it is the duty of the Judge to direct a verdict for the defendant: *Somerville v. Hawkins*, 10 C. B. 583 ; *Spill v. Maule*, L. R. 4 Ex. 232 ; *McIntee v. McCullough*, 2 Grant E. & A. 390.

There can be no doubt that the alleged libel, apart from the question of excess, was published under such circumstances as to make it a privileged communication. "The writer and persons addressed had a duty or interest in common : " *Henwood v. Harrison*, L. R. 7 C. P. 621.

The language in which the communication is couched does not seem to have gone beyond the limits afforded by the occasion.

Lord Campbell in *Harrison v. Bush*, 5 E. & B. 344, lays down the law in the following terms: "A communication made *bonâ fide* upon any subject matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminary matter, which without this privilege would be slanderous and actionable." And in *Gardiner v. Slade*, 13 Q. B. 800, Coleridge, J., says: "If the circumstances are such that all that was said and done was consistent with duty, the speaking of the words can afford no evidence of malice."

Then can it be said that the privilege has been displaced by the manner in which the communication has been dealt with. No doubt the Company could have printed and distributed amongst its employees the placards complained of, and if in addition to such mode of distribution the Company had published them in the newspapers, or had posted them up on the outside of their stations, or in their waiting rooms, I think this would have been such an excess of publication as would have rendered it liable. But it is evident from the letter of instructions written by the traffic superintendent of the Company that their intention was to convey only to those interested the information furnished by these circulars. The notice warned the employees that there had been a breach of one of the rules of the Company, and that this neglect of duty had been visited by the dismissal from office of the guilty party. It was most reasonable that all those employed in the service of the Company should at once be informed that the Company were going to put in force their rules rigorously, and that the servants of the Company must take the consequences of their disobedience. It was also most reasonable that this information should be conveyed not only by a notice addressed to each of the persons in the employ of the Company, but that the notice should be posted up in such a manner as continually to

attract the attention of the employees. To carry out this object the Company ordered that one of these circulars should be posted "in each station master's office, and another in each booking office that is not part of the station master's office; also one in each conductor's circular book; and the letter of instructions went on to say: "You will be good enough to take the receipt of each station master that he has received one or more copies of this circular, as may have been left; and you will please inform them that these circulars are intended for the private information of employees only, and must on no account be allowed to be taken off the Company's premises."

Under this letter the notices were placed in these rooms, most of which, if not all of them, appear to be private offices of the Company; and two witnesses are produced who swear that they while travelling saw them. The one is Judge Lawder, who says he saw it, his attention having been called to it in the one case by the station master, and he appears to have looked from the one room through the wicket into the next room, and thus caught sight of the placard. I gather from the evidence of Judge Lawder, the plaintiff, and the station master, that it was thus he gained the information as to which he testified. The other witness is Noah Phelps, who says, "I think I saw the circular at the Thorold station. I think I read it. I saw it while doing business at the office station: others could see it. I think I saw it at Copetown in the private room of the offices." The witness does not swear positively to what took place; and it is to be observed that the station master at Thorold swears distinctly that the room in which the placard was put up at Thorold "is a private office. It is marked private."

It is laid down in *Henwood v. Harrison*, L. R. 7 C. P. 623, that "The mere fact of the presence of a person uninterested has been held to be insufficient to take away the privilege."

If this be so I cannot see how the privilege can be said to be taken away here because some persons happened to have entered into certain rooms of the Company appro-

priated to their servants, and into which the travelling public, if admitted at all, are only allowed to enter as an act of courtesy on the part, not of the Company, but of some officer of the Company.

If the conductors of the Company had chosen to spread the knowledge of this placard by informing all the world of it, the Company would not be responsible for this act, although it may have been detrimental to the plaintiff; and can it be said, because a passenger prys into the private offices of the Company, or through a broken pane or a wicket which happens to be for a short time open obtains a view of a notice, that the Railway Company have been guilty of the act of publishing the notice of which the knowledge has been thus acquired?

In *Henwood v. Harrison*, L. R. 7 C. P. 622, there are the following remarks: "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

Looking at the circular under which these placards were put up,—at what was done by the officer entrusted with the posting of these notices,—at the evidence of the plaintiff himself, modified as it is on cross-examination,—I am unable to come to the conclusion that express or any malice has been shewn, or that the protection afforded to a privileged communication has been removed by the manner in which the defendants have dealt with it.

Coming to the conclusion as I do that the communication in question was privileged, and that this privilege has not been lost, I think that the learned Judge should have so ruled at the trial, and have granted a nonsuit, and therefore I think that the appeal should be allowed with costs.

*Appeal allowed. Rule absolute to enter
nonsuit in the Court below.*

REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

MICHAELMAS TERM, 36 VICTORIA, 1872.

(November 18th to December 7th.)

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

RE COLEMAN.

*County Attorney—Annual Certificates—Necessity for when practising only as
County Attorney.*

A County Attorney practising law only so far as required by that office,
need not take out a certificate.

During last Easter Term, *J. B. Read*, for the Law Society, obtained a rule *nisi* calling on the Attorney to shew cause why he should not be suspended from practising as an Attorney, &c., for a period of six months, and until the fee for his certificate to practice, together with a penalty of \$40, was paid to the Treasurer of the Law Society.

The application was based on an affidavit of Mr. *Read*, as Solicitor to the Law Society, shewing that Mr. Coleman was admitted an Attorney of this Court in 1845, and that his name appeared in the roll; that he was informed and believes that Coleman resided at Belleville; that he carried on the business of County Attorney for the county of Hastings; and that of a practising Attorney there; and that Coleman had not taken out any certificate.

During this Term, *Crooks*, Q. C., shewed cause—filing the affidavit of Mr. Coleman—which set out that he was County Attorney and Clerk of the Peace for the county of Hastings; that the last certificate taken out by him, was in December, 1868; that since the 3rd of December, 1868, he had not directly or indirectly practised as an Attorney in any of the Courts,—and had done no Law business whatever, excepting the business strictly relating to his offices of County Attorney and Clerk of the Peace, and had not since December, 1868, issued any processes or defended any suit; and he was not a partner in any Law or Chancery business whatever, and that the information referred to by Mr. *Read* was unfounded, &c.

Crooks, Q. C.—The affidavit of Mr. Coleman shews that there was no foundation for the motion, as the Attorney did not practice in the courts named. Consolidated Statutes U. C., ch. 37, sec. 3, required a County Attorney to be a Barrister-at-Law of not less than three years standing at the Upper Canada Bar, but it is not required that he should be an attorney at all. His duties do not bring him into the Court of Queen's Bench, Common Pleas, or Chancery.

J. B. Read supported the rule. The affidavit filed on obtaining the rule *nisi* shews that that Mr. Coleman is an attorney of the Superior Courts, and it is submitted that he is a practising attorney. In cases of misdemeanour a County Attorney would be entitled to fees as an attorney. [RICHARDS, C. J.—If he was struck off the rolls, could he not still practice as County Attorney?] Perhaps he might. It must be admitted that his affidavit shews his position to be different from what it was supposed to be.

MORRISON, J., delivered the judgment of the Court.

We must take it from the affidavit filed, that Mr. Coleman ceased practising as an Attorney in December, 1868, for which year he had taken out his certificate; that since

that period he has not practised as an attorney in this Court or any other Court, and in that respect this application fails.

The only other question is, whether Mr. Coleman is entitled to perform the professional duties appertaining to the office of County Attorney—duties which the statute casts upon that officer, without taking out his certificate. Now the only qualification required to authorize a person being appointed a County Attorney, is that of being a Barrister of three years standing. It is not necessary that the person holding that office, should be admitted an attorney.

It was conceded by Mr. *Read*, on the argument, that if Mr. Coleman was a Barrister, and not an Attorney, he could perform all the statuable duties imposed on him.

Mr. Coleman swears that he has not directly or indirectly since December, 1868, been engaged in any professional business except that strictly relating to his offices of County Attorney and Clerk of the Peace, and for the performance of such duties, we do not think that it is necessary he should take out any certificate.

This rule must be discharged with costs.

Rule discharged accordingly.

RE PLATT V. THE CORPORATION OF THE CITY OF TORONTO.

Municipal Act, secs. 226, 340—By-law to water a street.

Under sub-sec. 2 of sec. 340 of the Municipal Act, 1866, a Municipal Corporation may pass a By-Law to water a portion of a street only. It is not necessary in such a By-Law to name a day when it shall take effect.

Where such a By-Law provided that a special rate should be levied to be estimated on the contract price for such watering, without naming the sum to be raised—but the work had been done—the Court refused, in their discretion, to quash the By-Law. Where the By-Law ordered a special rate on a portion of a street to pay for watering “said street.” *Held*, that “said street” referred to only “said portion of that street.”

Foy obtained a rule *nisi* during this term calling on the corporation to shew cause why by-law No. 561, entitled

"An Act to provide for the watering of Jarvis street between Shuter and Cruikshank streets," should not be quashed with costs, on the following grounds: 1st. Because the corporation had not power or jurisdiction to pass a by-law for watering a portion only of Jarvis street. 2nd. Because on its face it appears that the petition on which the By-law was passed, was signed by two-thirds of the freeholders, &c., resident on a portion of said Jarvis street, and not on the whole street. 3rd. Because the said petition was not signed by two-thirds of the freeholders, &c., residents on the whole street, representing in value one-half of the ratable property thereon. 4th. Because no sum of money is mentioned or limited in said by-law. 5th. No proper application of said money is provided by said by-law. 6th. No day is named when the by-law should take effect. 7th. Because it is enacted, that a special rate shall be levied on the ratable property on a small portion of said Jarvis street for the purpose of watering the whole.

The application was founded on an affidavit of the applicant, with a certified copy of the by-law, and stating that he was assessed under it for \$19.94 cents, for watering that part of Jarvis street between Shuter and Cruikshank streets; and that such amount had been demanded of him; that the part of the street in question is only a small portion of Jarvis street; and that the freeholders and householders residing on that portion do not equal in number two-thirds of the number on the whole of said street; nor represent in value one-half of the ratable property on the whole street; and that, in the opinion of the applicant, the watering of the portion should not exceed \$30; that the applicant did not consent to the passing of the by-law, or become aware of it until it was passed.

The by-law was entitled "A by-law to authorize a special assessment for the purpose of watering Jarvis street between Shuter and Cruikshank streets." After reciting the statute, and that a petition signed by "at least two-thirds of the freeholders and householders resident on Jarvis street, in the Wards of St. James and St. David, between

Shuter and Cruikshank streets, representing in value one-half of the ratable property thereon, praying the city council to assess the inhabitants of the said street, for the purpose of watering the same." It enacted "that a special rate be levied on the ratable property situated on Jarvis street, between Shuter and Cruikshank streets, for the purpose of watering the said street, to be estimated on the contract price for the same, and to be levied, collected, and applied under the same powers, authorities and direction, as any other assessment, now is authorized to be levied and collected.

The corporation has filed an affidavit of the city engineer, stating that the street watering was undertaken in consequence of the petition referred to; that after the passing of the by-law; tenders were advertised for for watering between the said streets, and the tender of one Jones accepted, and that for the purpose of paying for the same, a special rate of two and three-quarter mills in the dollar was imposed, the whole amount being \$132; and that such sum was necessary for watering the portion of Jarvis street in question; and that it could not be executed for a less sum.

Robinson, Q. C., shewed cause. The first three objections are in substance the same and are untenable. Section 340, sub-section 2, of the Municipal Act, reasonably construed, enables the residents of part of a street to have such part watered. To hold that the whole must be watered or none, would in effect make the enactment useless. The residents on King street, for example, between York and Church streets, could not have that part watered unless they could persuade those living eastward as far as the Don and westward to Bathurst street to join them. In *Morell* and *The City of Toronto*, 20 C. P. 378, the by-law was for watering a portion of King street, and no objection was taken on that ground, *Dillon* on Municipal Corporations, p. 603, sec. 638. As to the fourth objection, it is difficult to say exactly beforehand what sum will be required, and in such small matters, the plan adopted here,

of making it depend upon the contract price is convenient and open to no serious objection. There is nothing in the fifth objection; and the sixth has no application, for this is not a by-law to contract a debt under sec. 226: *Re Montgomery et al. and the Township of Raleigh*, 21 C. P. 381. As to the last objection taken upon the by-law, it clearly means that the rate is to be expended in watering only the portion of the street mentioned in the petition.

Foy contra, sec. 340, sub-section 2, enables the Corporation to pass by-laws for raising upon the petition of at least two-thirds of the freeholders and householders resident in any street, &c., representing in value one half of the rateable property therein, such sums as may be necessary for watering the street. This means the whole street, not any part thereof. The fourth objection at all events is fatal: *The Canada Company v. The Municipal Council of the County of Middlesex*, 10 U. C. R. 93; *Tylee v. The Municipal Council of the County of Waterloo*, 9 U. C. R. 572. The requirements of section 226, apply to this by-law, and sustain the fifth objection, and the last objection is supported by the words of this by-law, which enacts expressly that the rate shall be levied on a portion of the street, for the purpose of watering the said street.

MORRISON, J., delivered the judgment of the Court.

I think we would be putting too narrow a construction upon sub-section 2 of section 340 of the Municipal Act, were we to hold that the petition mentioned in that sub-section, meant a petition of two-thirds of all the freeholders, &c., resident in a street from one end of it to the other; and that the provisions for sweeping, lighting, and watering referred to in that sub-section, could only apply to the sweeping, &c., of the whole of a street, and not to any portion of it. In other words, no matter how long or extended a street might be, or how useless or unnecessary it might be to sweep or water the whole of it that nevertheless, the inhabitants residing on a portion of it, and who might be willing to tax themselves for water-

ing their portion, could not avail themselves of the provisions of the second sub-section referred to.

To construe the enactment as contended for by Mr. Foy, would render it in the large majority of cases practically nugatory.

In a recent case of *Morell v. The Corporation of the City of Toronto*, 22 C. P. 323, the authority of the city council to pass by-laws under the 340th section in question was under discussion. There the application was to quash a resolution of the corporation for watering a portion of Queen street between John street and Spadina Avenue, and portions of nine other streets, passed upon the petitions of the respective residents of the respective portions of the streets referred to, and ordering rates to be levied in compliance with a by-law passed two years previous, which by-law was intended to apply to petitions presented for watering portions of streets. The Court of Common Pleas dealt with the provisions of the sub-section two as applicable to the watering of a portion of a street upon the petition of the inhabitants of such portion. The objection taken here was not mentioned or suggested in that case, and although the Court quashed the resolution for the reason given in the judgment, as far as the portion on Queen street was concerned, they allowed the resolution to stand in respect of the portions of the nine other streets.

In my opinion the objection ought not to be allowed.

It was also objected that the by-law was illegal, as no sum was mentioned or limited in the by-law. It is true that the by-law does not state the amount to be raised and levied, and in that respect it is open to the objection. It only sets out for what purpose the rate is required, and the amount required is limited to the contract price to be paid for the watering of the street. We see by the affidavit filed, that the whole amount to be raised was \$132; and it also appears by the affidavit of the City Engineer, that the work was performed, and that the petitioners had the benefit asked for in their petition, and that the amount to be levied was the contract price,

The effect of our quashing the by-law on account of this informality would be the passage of another by-law to remedy the defect; and the question is, whether in a case of this nature, where the interference of the Court is a matter of discretion, we should quash so much of this by-law. No injustice seems to have been done, and the amount in question is small.

I do not think the case is one calling for our interference.

As to the sixth objection, the cases of *In re Michie v. The Corporation of the City of Toronto*, 11 C. P. 379; and the case of *In re Montgomery et al. v. The Township of Raleigh*, 21 C. P. 381, are authorities against it.

Then as to the objection, that the by-law enacts that the rate should be levied on the ratable property on Jarvis street between Shuter and Cruikshank streets, for the purpose of watering the *said* street, I think we may assume, considering the whole of the by-law, that the words "said street," refers to so much of the said street as lies between the two streets previously named. The title of the by-law shews that such was intended, and the affidavits shew that the watering in question was limited to the portion between those streets.

I think the rule should be discharged; but as the Corporation, by their defective by-law, induced this application, they will have no costs.

Rule discharged, without costs.

WARREN V. DESLIPPES.

Fence-viewers' award—Proof of by a copy—C. S. U. C. ch. 32, sec. 6—Trespass—Right to nominal damages.

In trespass defendant justified cutting the ditch complained of under an award of fence-viewers, &c. The jury found for defendant on this issue, and on the general issue that there was no damage. *Held*, that as a right was involved, the plaintiff was entitled to a verdict on the general issue for nominal damages.

The township clerk produced a copy, which he swore was a true copy, of the fence-viewers' award, the original being in his custody. *Held*, that such copy was admissible in evidence under C. S. U. C. ch. 32, sec. 6, these awards being made by a statutable public office acting in a judicial capacity, and which might affect a large portion of the public, and even municipalities.

Semble, per *Wilson, J.*, that if the copy had been one delivered by the fence-viewers, under the statute, it might have been received without proving it to be a true copy.

TRESPASS to the north half of lot 76, in the 6th concession of Malden.

Pleas—1. Not guilty. 2. That defendant owned and occupied the south part of lot 76, adjoining the land of the plaintiff, and it was the joint interest of the plaintiff and the defendant to open a ditch for the purpose of letting off surplus water from certain low and wet land, to enable the owners thereof to cultivate and improve the same; and a dispute arose between the plaintiff and the defendant, respecting the proper proportion of the ditch which each of them should make, construct, and open. And thereupon the defendant duly notified the fence-viewers of the dispute, and of the time and place of their meeting for the investigation thereof, and did also notify the plaintiff to appear at such time and place, and the fence-viewers did appear at the time and place, and examined the premises, and heard such parties and witnesses as they were called upon to hear, and divided the ditch between the plaintiff and the defendant; and awarded that the plaintiff should make and open the ditch from the boundary line between the lands of the plaintiff and defendant, across and over the land of the plaintiff, to a certain run or creek on the plaintiff's land, and that the plaintiff should complete the said work on or before the 21st of November, 1870, and if the

same were not completed at that time, the defendant might do the same at his own expense. That the plaintiff, after due notice, neglected and refused to open and make the proportion of the ditch so awarded to be made by him ; whereupon the defendant did make and open the ditch, and for the purpose of doing so was obliged to, and did enter the plaintiff's land and cut and dug the drain, doing as little damage as possible, which are the trespasses complained of.

Issue.

The cause was tried before Hagarty, C. J., C. P., at the Fall Assizes at Sandwich.

In the course of the trial, the clerk of the township was called. He said : " I have in my office the original award, made by the fence-viewers. I gave a copy to each party. I produce a true copy of the award, which I saw signed."

Mr. *O'Connor* objected, that the original award should be produced and proved. The learned Chief Justice said he inclined to think so ; but he allowed the case to go on.

At the close of the evidence, the Chief Justice noted as follows : " It appears to me, I must, subject to the objection to the proof of the award, (which I am inclined to think fatal), tell the jury that the plea of justification appears to be proved in substance, and if so, to find for defendant on it. On not guilty, it is agreed that the parties go to the jury on the question of damage. The jury find there was no damage. Verdict for defendant."

In this term, *Harrison*, Q. C., obtained a rule, calling on the defendant to shew cause why the verdict should not be set aside, and a new trial had, for the rejection of improper evidence, by receiving the copy of the award in question, without proof of the original ; and on the ground that the verdict was contrary to law and evidence, because the award, if proved, was not a valid award, and the defendant was without any legal justification or excuse for the trespasses he committed ; and that the injury having been to a right, the plaintiff was entitled to a verdict without

proof of any actual damages; and if proof of damage were necessary to be given, the finding of the jury that no damage had been done was against evidence, and the weight of evidence.

Prince, Q. C., shewed cause. The copy produced by the defendant of the award, was the copy which had been delivered to him by the arbitrators under the statute. It is a public document, but if not, it is receivable under the Common Law rule: Consol. Stat. U. C. ch. 57, sec. 9; Ont. Act, 32 Vic. ch. 46, sec. 2; Consol. Stat. C. ch. 80, sec. 5; *Colling, Gent., one, &c. v. Treweek*, 6 B. & C. 394; *Tay. Ev.*, 6th Ed., sec. 409, p. 437.

Harrison, Q. C., supported the rule. The defendant must shew a statute to permit the copy of the award to be received in lieu of the original. If he cannot do that, he must produce and prove the original. Consol. Stat. U. C. ch. 32, sec. 6. The particular section applicable is, sec. 9 of the Consol. Stat. U. C. ch. 57. The general statute has no application here.* Consol. Stat. C. ch. 80, sec. 5, is relied on. If any copy could be received, it must be one certified to by the arbitrator. The award pleaded is not described properly or with certainty, according to the statute.

The cases of *Embrey et al. v. Owen*, 6 Ex. 353; *The Company of Proprietors of the Navigation of the Medway v. Romney*, 9 C. B. N. S. 575; *Harrop et al v. Hirst*, L. R. 4 Ex. 43; *Ashby v. White*, Lord Raym. 938, 955; *Mayne on Damages*, 2nd ed., ch. 2, page 4, shew the plaintiff had the right to damages if his case were proved; because a right is involved affecting his land for all time to come, although the damages be only nominal.

WILSON, J., delivered the judgment of the Court.

By the Fence-viewers' Act, Consol. Stat. U. C. ch. 57, sec. 9, "Every determination or award of fence-viewers shall be in writing, signed by such of them as concur therein; and they shall transmit the same (or a certified copy thereof,) to the clerk of the municipality, and shall also deliver

a copy to every party requiring the same, and such determination shall be binding on the parties thereto."

By the Consol. Stat. C. ch. 80, sec. 5. "In every case in which the original record could be received in evidence, a copy of any official or public document in this Province, purporting to be certified under the hand of the proper officer, or person in whose custody such official or public document may be placed, or a copy of any document, by-law, rule, regulation or proceeding, or a copy of an entry in any register or other book of any corporation, created by charter or statute in this Province, purporting to be ratified under the seal of such corporation and the hand of the presiding officer or secretary thereof, shall be receivable in evidence * * * without any proof of the seal of such corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without any further proof thereof."

By Consol. Stat. U. C. ch. 32, sec. 6, "Whenever any book or other document of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders its contents provable by means of a copy, a copy thereof or extracts therefrom shall be admissible in evidence in any court, * * * provided it be proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original has been entrusted."

The copy of the award in question does not come within Consol. Stat. C. ch. 80, sec. 5, because the copy did not purport to be certified under the hand of any officer or person whatever. That section was taken from the 13 & 14 Vic. ch. 19, sec. 4, and has been taken from the Imperial Act, 8 & 9 Vic. ch. 113.

The words at the end of our statute of 1850, after declaring that such certified copies shall be received as evidence, are, "and without any further proof thereof, in every case in which the original record could have been received in evidence," and, as before shown, are in their effect placed at the beginning of the section in our consolidation.

The same words are at the end of the section of the Imperial Act also; and in *Taylor* on Evidence, 6th ed., sec. 7, p. 14, in the note, it is said, "These words were introduced into the Act while passing through the House of Commons * * * by some honourable member who did not know distinctly what he was about."

In *Powell* on Evidence, 279, it is said, "It seems impossible, as remarked by Mr. *Phillips* (vol. 2, p. 241,) to give any meaning to these last italicised words (original record.) The professional reader will however, read 'record,' as synonymous for the occasion with 'document.'"

That would seem to be so, because the documents mentioned in that section are not many of them, and in the others need not be, *records* at all, in the strict and proper acceptation of the term.

It is very probable, therefore, that the 5th section before mentioned, beginning "In every case in which the original *record* could be received in evidence," must be read as if the word *record* were *document* instead.

Although that section, as stated, does not apply to this case, it is material to refer to it for the purpose of showing the kind of documents to which it does extend, because that will tend to throw some light on the classes of documents which may be received under the Consol. Stat. U.-C. ch. 32, sec. 6, as it will be under that enactment that this copy, if admissible at all, can be received.

All entries found in corporation books are not admissible in evidence, but only such entries which are of a public nature. The corporation books are not public books for all purposes. In *Marriage v. Lawrence*, 3 B. & A. 142, the question was, as to the right of the borough of Malden to certain tolls. To prove that right the borough books were produced, showing a seizure by the borough officers for tolls in the time of Henry VIII., and a payment made under the seizure. That was held to be an entry of a private nature, although entered in a public book, a minute made by a party in his own memorandum book; and as it was an entry of a private nature, it was not receivable in

evidence: *London v. Lynn*, 1 H. Bl. 214, note (c); *Tay. Ev.*, 6th ed., sec. 1581, p. 1515.

In *Richardson v. Mellish*, 2 Bing. 229, 240, it was held, that a book containing a list of passengers, made by the captain of an East Indian ship, and deposited in the India House under a statute, was receivable in evidence. The Chief Justice said it was "a public paper made out by a public officer, under a sanction and responsibility which impel him to make that paper out accurately; and that being the case, it is admissible in evidence on the principle on which the sailing instructions, the list of convoy, and the list of the crew of a ship, are admissible."

A book of office kept by a public officer under the Admiralty, made up from returns made by the officers of ships, of persons dying on board, was held to be receivable in evidence to prove the death of the intestate, in an action by the administrator to recover a debt due to the intestate: *Wallace v. Cook*, 5 Esp. 117.

In *Motteram v. The Eastern Counties Railway Co.*, 7 C. B. N. S. 58, the defendants made a by-law under the Act of Parliament, imposing a penalty on passengers who should get in or out of a car while in motion. Such by-law was confirmed and allowed as required by the statute. Held, in a proceeding before Justices, against a passenger for breach of the by-law, that a copy of the by-law was properly received as evidence. Erle, C. J., said, "It was properly received in evidence as a document of a public nature. Railway companies certainly do affect and regulate the interests of the public to a very large extent, and in a great number of ways. The statute contemplates that these by-laws * * * shall, before they shall be of any force, receive the confirmation and allowance of the Board of Trade or the Commissioners of Railways. They are also to have the sanction of the common seal of the company; and one governing copy is to be kept by the secretary. I, therefore, think it is a document which falls within the common law principle applicable to documents of a public nature. It also falls within the 14 & 15 Vic. ch. 99, sec.

14, which expands the rules of the common law as to the admissibility of public documents. The Justices were quite right in admitting the copy in evidence."

Crowder, J., said, "The first question is, whether the examined and certified copy of the by-laws was rightly received in evidence. Looking at the nature of railway companies, the purposes of their incorporation, and the large and general interests involved, it appears to me, that their by-laws, made under the sanction and authority of a public act of parliament, and sealed with the common seal of the company, and deposited with their public officer, must follow the general rule of evidence as to public documents—which I understand to mean documents of such a nature and character that a large portion of the public are materially interested therein."

In *Reed v. Lamb*, 6 H. & N. 75, the register of voters at a parliamentary election, made under the statute, was held to be a document of so public a nature as to be admissible in evidence on its mere production; and, therefore, an examined or certified copy was held admissible.

Wilde, B., said, "It is a document in which the public are concerned; it is kept in pursuance of an Act of Parliament, and confided to the custody of a particular officer for a public purpose; and, moreover, the act provides that any person may have a copy of it. Public convenience requires that a copy should be admissible in evidence."

"Whenever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence;" *Lynch v. Clarke*, 3 Salk. 154; *The King v. Lord George Gordon*, 2 Douglt. 593, in the notes.

Under the Fence-viewers Act, the reference may be between more than two parties, and it may affect a large area of country. And by the Act of 1869 it may be made as against non-residents, whose lands are, on the report of the fence-viewers to the clerk of the municipality, and by him to the county treasurer, to be charged with their share of the expense of the works as if it were a wild land tax. So

a municipality, under the same act, may be a party to such a reference.

The award is to be in writing and signed, and it, or a certified copy of it, to be transmitted by the fence-viewers to the clerk of the municipality; and they are also to deliver a copy of it to every party requiring the same; and it is to be binding on the parties thereto.

An appeal by the late act lies to the Judge of the County Court, which appeal extends to awards made under the prior act as well: *Re McDonald and Cattanach*, 30 U. C. R. 432.

And for non payment of the share of expense incurred under the award, proceedings of a strictly judicial character are to be had, which may be enforced by execution from the Division Court, "in the same manner as if the party in whose favour the determination has been made, had recovered judgment in the Division Court for the sum which the fence-viewers had entitled him to receive with costs."

The fence-viewers must be public officers entitled to notice of action, and to the [protection of Consol. Stat. U. C. ch. 126, for a pound-keeper is within it: *Davis v. Williams*, 13 C. P. 365.

A mandamus would also lie to compel the delivery of a copy of this award: *The King v. The Justices of Staffordshire*, 6 A. & E. 84, 100.

The reasons assigned in the cases above referred to,—although it may be, "that a large portion of the public" will not always be materially interested in any particular award—do apply to this case. Because a large portion of the public—people in two if not in more than two municipalities—may be interested, and the statute makes no distinction between one kind of award and another kind of award made under the act. Because, in addition to the reasons given in the English decisions, the fence-viewers proceed judicially by statute. Their award is binding. Judicial proceedings follow upon it if payment has to be

enforced, in which the witnesses are sworn. The report or determination of the fence viewers is final.

The Justice to whom the fence-viewers return their report, is to transmit the same to the clerk of the Division Court, and also a certified copy to the clerk of the municipality, which he shall enter in the books in which the municipal proceedings are recorded.

By the Municipal Act, the clerk is to have a book in which he is to enter "municipal proceedings;" and he is bound to furnish a copy of the same to any applicant: 29-30 Vic. ch. 51, sec. 152, 153.

And by the Division Courts Act, the clerk is to enter a note of all summonses, orders, judgments, executions, and returns thereto, in a book, and to sign every page of it; "and such signed entries or a copy thereof, certified as a true copy by the clerk, shall be admitted in all courts and places as evidence of such entries, and of the proceedings referred to thereby, without any further proof: Consol. Stat. U. C. ch. 19, sec. 42. And then follows the execution before mentioned.

The fence-viewers, it must be remembered, too, are municipal officers appointed by by-laws of the municipality: 29-30 Vic. ch. 51, sec. 246.

I am of opinion, that—as it is statutable public officers who make the award, and who are to examine the premises and hear the parties and their witnesses if demanded: Consol. Stat. U. C. ch. 57, sec. 11; and who are to make an award which is to be dealt with as before stated—that it may properly be said this award is a document of so public a nature as to be admissible in evidence on its mere production from the proper custody; and, therefore, that an examined copy, or a copy purporting to be signed and certified as a true copy by the officer to whose custody the original has been entrusted, is admissible in place of the original.

The copy which was produced was one not delivered by the fence-viewers under the statute. If it had been, it might perhaps have been receivable without shewing it to

be a copy : *Black v. Braybrook*, 2 Stark, 12; B. N. P. 229.

It was a copy delivered by the clerk of the municipality, "in whose custody the original has been entrusted."

There was no objection made to the kind of copy which was produced, nor to its not being properly proved to be a copy. The objection was, that a copy, however well proved, or authenticated, was inadmissible, and that the original itself must be produced, and was the only legal evidence of an award; but we think, for the reasons before given, that the objection which was taken should not prevail.

The plaintiff has, therefore, failed on the question of right.

It was said the award itself was not sufficient in law, but no objection was pointed out to us, sufficient to interfere with the verdict, and if it be objectionable, the plaintiff should have demurred to it, if it appear on the record.

The plaintiff having failed on the right, it can be of no moment whether he has a verdict on the general issue or not, excepting as it affects the costs.

The plaintiff should have had a verdict on the general issue; for there was was, as respects that issue, a trespass proved; and admitted, we may say; and on that issue, if the defendant had failed on the special plea, the plaintiff should have had damages, for a nominal sum at any rate, entered in his favour, because a right, and a very important one, was directly affected.

The jury might, in strictness, though they found the special plea against the plaintiff, have found the general issue in his favour, with damages : *Sayre v. Rockford*, W. Bl. 1165; *Clement v. Lewis*, 3 B. & B. 297.

But it is not usual in modern practice to do so, although it might be done with advantage, if the plaintiff thought he might succeed on a motion *non obstante*.

If they had done so here, the plaintiff could have made no use of the assessment, while he failed on a plea going to the whole cause of action. He would have been in no better position with the assessment, while the special plea

was found against him, than he would have been in if the jury had found the general issue in his favour, without finding as to damages at all.

We think he should be put in that position now, for the defendant did indisputably do the acts in question upon the plaintiff's land.

The defendant should therefore enter the verdict on the general issue in the plaintiff's favour, if the plaintiff assent to it, and if that be done, or if the plaintiff refuse to assent, the rule will be discharged, with costs in either event to be paid by the plaintiff.

Rule accordingly.

SMITH V. THE COMMERCIAL UNION INSURANCE COMPANY.

Fire insurance—Policy not under seal—Pleading—Waiver of conditions—Estoppel in pais—Remarks as to unreasonable conditions.

Declaration on a fire insurance policy not under seal, alleging that, subject to certain conditions, the plaintiff was entitled to recover for loss of goods by fire, and setting out the third condition, which was to the effect that the plaintiff should give notice of every alteration, &c., in the building in which the goods insured were contained, and should have the allowance of the same endorsed upon the policy; and the 14th condition, to the effect that the plaintiff was to give a written statement of his loss, within 14 days after the fire, specifying the particulars and verifying it in the manner described in the condition. The declaration averred that the plaintiff was ready and willing to give the notice in the 14 days as required, but within that time the defendants took possession of the goods which remained, and prevented the plaintiff from giving the required account, and the defendants waived the said condition, and discharged the plaintiff from fulfilling the same. And as to the third condition, it was averred that the plaintiff did give notice of every alteration, &c., in writing, and requested the defendants to allow the same in accordance with the conditions, and the defendants accepted the notice and waived the endorsement upon the policy, and discharged the plaintiff from requiring the same to be so endorsed, and afterwards continued and confirmed the policy.

Fifth plea, to the whole count, that by another condition in the policy, no condition should be deemed to have been waived except by writing endorsed upon the policy, and signed by the general agent, and that the condition (14th) requiring a statement of loss to be put in in 14 days was not so waived.

Eighth plea, setting out the third condition, requiring notice of change in building, &c., and averring that there had been such change, and the plaintiff did not notify the defendants of it in writing, nor was it allowed by endorsement, nor did the defendants waive such endorsement.

Ninth plea. Setting up the same defence as to the 3rd condition as the 5th plea did to the 14th, that the condition could not, under the terms of another condition in the policy, be waived, except by writing endorsed on the policy, and that it was not so waived.

Replication by way of estoppel, to so much of the 8th plea as alleged that the alteration was not allowed by endorsement, and that the defendants did not waive such non-endorsement, that the plaintiff gave notice in writing of such alteration, and delivered the policy to the defendants to have the allowance of such alteration endorsed thereon, and also to have the allowance of a further assurance endorsed thereon, and the defendants accepted it for these purposes, and afterwards endorsed the allowance of the further insurance thereon, and returned the policy to the plaintiff, and informed him that all had been done under the policy and conditions which was necessary.

The defendants' rejoined to this replication, the condition already mentioned, that no condition could be waived except in writing endorsed on the policy.

The plaintiff demurred to the pleas and to the rejoinder; and the defendants excepted to the declaration, and demurred to the replication.

Held, as to the declaration: 1. That the averment of prevention by defendants was a perfect excuse for non-compliance with the 14th condition. 2. That the averment of waiver and discharge of the third condition was sufficient, as being a parol discharge to the plaintiff from obtaining performance by the defendants of an act which they were to do under an instrument not under seal.

Jacobs v. The Equitable Insurance Co., 17 U. C. R. 35, dissented from.

The fifth plea was held bad, as being pleaded to the whole count, and answering only the act of waiver alleged, not the alleged prevention by defendants of performance; and as setting up a want of waiver in a particular form to a ground of excuse (*i.e.*, prevention of performance by defendants) not dependent on the waiver mentioned in the plea.

Seemle, that the declaration alleged separately such prevention, and that defendants in some other way waived performance; and did not state the waiver as a result merely of the alleged prevention.

The eighth plea held good, as it concluded with a good traverse, that the defendants did not waive the endorsement of the alteration, &c.

The ninth plea was also held sufficient, because it properly disclosed a further reason why the waiver alleged by the plaintiff should not be effectual, in this, that the fact of waiver was required to be verified in a particular form, and that such form had not been observed.

The replication was held good as an estoppel, for the plaintiff was led by conduct and acts of the defendants to believe and might well have believed that no advantage would be taken of the non-endorsement on the policy of the alteration, and might in consequence have refrained from insuring elsewhere.

The rejoinder was held good, for it was not a departure from but supported the plea denying the waiver, and shewed why the estoppel against such denial should not apply.

Remarks as to the conduct of business by insurance companies, and the necessity of legislative interference to prevent the multiplication of unreasonable conditions, and protect the public.

DEMURRER. Action on a policy, not under seal, against loss by fire, to the amount of \$4,000, on goods in a country store (liquors excepted.)

In and by the said policy it was declared that, subject to the conditions endorsed upon the policy, and which constituted the basis of the said insurance, the plaintiff should be entitled to be paid out of the capital stock and funds of the Company the amount of loss which he might suffer or be put to by fire, &c.

Several of the said conditions were set out in the declaration, among them the third and fourteenth.

The third condition was as follows: "If, during the continuance of the policy, there be any erection, alteration, or extension of or upon the premises, or if the risk be increased or in any respect altered by any change in the use or occupation of the neighbouring premises, or by any other means whatever, whether under the control of the assured or not, unless the insured immediately notify the Company in writing, describing fully the nature and degree of the change in the risk, and pay such additional sum as shall be required by the Company for the increased risk, and the same be allowed by endorsement hereon, the assured shall not be entitled to any benefit under the policy."

The fourteenth condition was as follows: "Persons assured by this Company sustaining any loss or damage by fire, &c.

1. (a) "Are forthwith to give notice thereof in writing at the office of the Company at Montreal, or to the agent of the Company through whom the policy was effected.

2. "And are within fourteen days after the loss,

3. "To deliver in writing, in duplicate,

4. "A particular statement and account of their loss or damage,

5. "Specifying fully the particulars of the property destroyed or damaged,

6. "And what was the whole cash value thereof, and of the property insured, immediately before the fire,

7. "The assured's title or interest therein,

(a) The numbers are not in the original condition, but are inserted here as explaining the judgment. See *post* p. 89.

8. "And the names and residences of all other parties (if any) interested therein,

9. "And of all incumbrances, whether mortgages, judgments or executions, affecting the property insured, or any part thereof,

10. "The amount of loss or damage sustained,

11. "Whether any other insurance or insurances had been effected upon or in respect of the same property,

12. "And if so, full particulars of each and every such other insurance,

13. "And, if requested, a copy thereof,

14. "Also stating, in what manner, (as to trade, manufacturing, merchandize, or otherwise) the building insured or containing the property insured, and the several parts thereof, were occupied at the time of the loss,

15. "And who were the occupants of such building,

16. "And when and how the fire originated, as far as the assured may know or believe.

17. "And the assured shall verify such statement and account by the production of their books of account and other vouchers,

18. "And by affidavit or statutory declaration of the assured, sworn or made before a Justice of the Peace,

19. "And, where practicable, the assured shall further verify such statement and account by the testimony of their domestics, servants, or other persons in their employ.

20. "Claimants for loss or damage must also swear that the fire was not caused through their wilful act or neglect, procurement, means, or connivance.

21. "The assured must also procure a certificate under the hands of two Magistrates, most contiguous to the place of the fire, and not concerned or directly or indirectly interested in the loss or the assurance, as creditor or otherwise, or related to the assured or sufferers,

22. "That they are acquainted with the character and circumstances of the assured, and have made diligent enquiries into the facts set forth in the statement and account of the assured, and know, or verily believe, that the assured

really by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss or damage to the amount herein mentioned,

23. "And, if required, the assured shall submit to an oral examination by the directors, or any of them, or the inspector or attorney of the Company, or any agent of the Company authorized by them for the purpose,

24. "And shall answer all questions touching his, her or their knowledge, or anything relating to such loss or damage, or to their claim in consequence thereof, or the origin of the fire,

25. "And shall subscribe and swear to such examination, or so much thereof as shall have been reduced to writing.

26. "If the assurance be on a building or buildings, or on machinery or fixtures therein, the assured shall produce his title deeds to the property,

27. "And an abstract of the title thereto from the registry office of the county or city in which the loss occurred.

28. "The assured shall also supply such other vouchers, and produce such further evidence, and give such other explanations as the directors, or any of them, or the inspector or agent aforesaid, may reasonably require, to prove such account of loss or damage, and the assured's right to recover the amount claimed,

29. "And until such accounts, declaration, testimony, vouchers, and evidence, as aforesaid, are produced, and examination, (if required), and such explanation given, no money shall be payable by the Company under this policy,

30. "And if there shall appear any fraud, or any false, untrue, or exaggerated statement or item in such statement or account of loss or damage, or in any such books of account, or in any such testimony, vouchers, evidence, or explanation,

31. "Or if such affidavit or statutory declaration shall contain any untrue statement,

32. "Or if it shall appear that the fire shall have hap-

pened by the procurement or wilful act, or by the means or connivance of the assured, or of the claimants,

33. "Then, and in any or either of the said cases, the assured and all persons claiming under them or either of them, or otherwise by virtue of the policy, shall be excluded from all benefit from the insurance, and this policy shall be absolutely void.

34. "And if the claim shall not, for the space of three months after the occurrence of the fire, be in all respects verified in manner aforesaid, the assured shall forfeit every right to restitution or payment by virtue of this policy.

35. "And time shall be of the essence of this contract.

36. "No profit of any kind is to be included in any claim to be made under this policy.

The plaintiff averred, "that he was ready and willing, within the fourteen days, in the said condition numbered fourteen mentioned, to have delivered in writing, in duplicate, a particular statement and account of his loss and damage specifying fully the particulars of the property destroyed or damaged, and what was the whole cash value thereof, and of the property insured immediately before the fire; but that before the said fourteen days had elapsed, the defendants took possession of the said premises, and of all the goods and property insured remaining after the said fire, and deprived the plaintiff of the possession and control thereof, and excluded him therefrom, and prevented him from examining the said goods in detail, and making up a full and detailed account of the said loss. And the defendants waived the fulfilment of the said condition precedent, and discharged the plaintiff from fulfilling the same as a condition precedent to payment of the said loss by the defendants. And the plaintiff also avers, that he did give full notice in writing of every erection, alteration, and extension of and upon the said premises, and requested the defendants to allow the same in accordance with the conditions of the said policy, and the defendants thereupon accepted the said notice, and waived the endorsement of

the same on the said policy, and discharged the plaintiff from requiring to have the same so endorsed, and afterwards continued and confirmed the said policy. And all conditions were fulfilled, &c."

2nd Count—Trespass to goods, &c.

3rd Count—Trover for goods, &c.

The fifth plea, which was to the whole of the first count, set up "That by a condition endorsed on the said policy, it is provided that no one of the conditions or stipulations endorsed on the said policy, either in whole or in part, shall be deemed to have been waived by or on the part of the said Company, unless the waiver be clearly expressed in writing by endorsement upon the policy, signed by the general agent of the Company for Canada. And the defendants say, that the alleged waiver of the said condition numbered fourteen, on the said policy, and requiring the delivery within fourteen days of the particular statement of loss in the said condition specified, was not clearly expressed in writing by endorsement on the said policy, signed by the general agent of the Company for Canada; wherefore the defendants say, that by the breach of the condition the said policy became and is void."

The eighth plea was to the alleged waiver of the third condition; and, after setting out the same, alleged, that "during the continuance of the said policy there was an erection, alteration, and extension of and upon the said premises, by a frame addition made to and in rear of the said premises in which the said insured goods were contained, of which the plaintiff did not notify the defendants in writing, nor was the said erection or alteration allowed by endorsement on the said policy, nor did the defendants waive the endorsement of the same on the said policy, wherefore the plaintiff is not entitled to any benefit under the said policy, and the same became void."

The ninth plea to the first count, was the same as the fifth plea to the same count, alleging that the waiver alleged of the *third condition* was not in writing on the policy, and so the defendants did not waive the condition, and the policy thereby became void.

The plaintiff demurred to these three pleas.

To the fifth plea, 1. Because it did not traverse or confess and avoid the declaration; and, 2. Because the declaration sets up what amounts to an estoppel *in pais* against the defendants setting up the breach of the condition referred to in the plea; and the provision with reference to the waiver of condition, is irrelevant to the said allegation.

To the eighth plea, 1. Because it neither traverses nor confesses and avoids the declaration; 2. Because the declaration alleges that the plaintiff did give notice to the defendants of the alteration of the risk, and attempts to excuse the plaintiff from getting that endorsation made upon the policy; and the plea, merely alleging that the endorsation was not made on the policy, is irrelevant; 3. That the plea seeks to raise an issue in law as to the construction of the condition; 4. And that the traverse in the plea is too large.

To the ninth plea: 1. That it does not traverse nor confess, and avoid the declaration; 2. That the declaration admits the non-endorsation on the policy, and alleges an excuse for the same, and the plea is irrelevant to such excuse.

The plaintiff also replied, "to so much of the eighth plea, as alleges that the erection or alteration in the said plea mentioned, was not allowed by endorsement on the said policy, and that the defendants did not waive the endorsement thereof on the said policy, * * that the defendants ought not to be allowed to allege that the said erection or alteration was not allowed by endorsement on the said policy, nor that the Company did not waive the endorsement of the same on the said policy, because the plaintiff did, immediately on the making of the erection or alteration give the defendants notice in writing of the said erection or alteration, as by the conditions required; and did deliver to the defendants the policy for the purpose of the defendants endorsing on the said policy their allowance of the said erection or alteration; and for the further purpose of

endorsing on the said policy the consent of the defendants to a certain further assurance of the said premises for the further sum of \$2,000 in the Western Assurance Company, of which the plaintiff then also gave notice to the defendants; and the plaintiff further says, that the defendants then accepted from the plaintiff the said notice, together with the policy, for the purpose of endorsing the said consent as aforesaid, and for the purpose of endorsing the consent of the defendants to the said further assurance, &c. ; And the plaintiff further says, that after the said several notices had been given, and the policy had been so delivered by the plaintiff to the defendants for the purposes aforesaid, and after the defendants had so accepted the same, the defendants endorsed on the said policy their consent to the said further assurance, and then re-delivered the said policy to the plaintiff, and then and there informed the plaintiff that everything which was necessary under the policy, and the conditions endorsed thereon, had been done, wherefore the plaintiff prayed judgment if the defendants ought to be allowed," &c.

The defendants demurred to the replication, 1. Because it showed that the required endorsement therein referred to was not made or waived, as by the condition was required; and 2. That the replication answered only an immaterial allegation in the plea.

The defendants rejoined also to the replication to the eighth plea, setting up the same condition which the defendants had before set up in the ninth plea to the alleged waiver of the same third condition, that no waiver should be valid unless in writing, endorsed on the policy, and signed by the general agent of the company for Canada; and that there was no such writing endorsed and signed.

The plaintiff demurred to this rejoinder, 1. Because it does not traverse or confess, and avoid the replication; 2. Because the replication alleging that the defendants are estopped from relying on the condition mentioned in the eighth plea, it is no answer to such estoppel that the conditions of the policy provide for a waiver only being effectual if in writing.

The defendants gave notice of exceptions to the sufficiency of the declaration—that the declaration showed a non-compliance with the third and fourteenth conditions endorsed on the policy, and the plaintiff has no remedy at law on the policy. Joinder.

During this Term, *McMichael*, Q.C., and *Anderson*, Q.C. argued the demurrers for the plaintiff. The waiver was a perfect avoidance of the literal performance of the conditions, and enabled the plaintiff to have his recourse at law; and the replication is properly pleaded as an estoppel to the defendants' setting up the strict terms of the condition as a bar to the action: *Wing v. Harvey*, 23 L. J. Ch. 511; *Supple v. Cann*, 9 Ir. C. L. Rep. 1; *Armstrong v. Turquand*, 9 Ir. C. L. R. 32; *Brady v. The Western Assurance Co., (Limited)*, 17 C. P. 597; *Perrins v. The Marine General Travellers' and Ins. Society*, 2 E. & E. 317; *Macgregor v. Rhodes et al.*, 6 E. & B. 266; *Freeman et al. v. Cooke*, 2 Ex. 654. If the defendants told the plaintiff he had a subsisting policy, intending him to act upon it, when they returned it to him after the endorsement upon it of the allowance of the further assurance, and he acted upon it, they should be estopped from saying that he has not a valid policy: 1 *Wms. Saund.* 578, 579, Ed. of 1871. A dispensation with a condition may require a waiver in writing, but the facts here amount to an estoppel to the allegation that we need a waiver in writing.

Harrison, Q.C., and *Hector Cameron*, contra. This replication is an attempt to get over the decisions of *Nodd v. The Provincial Insurance Co.*, 18 U. C. R. 584, and *Weinaugh v. The Provincial Insurance Co.*, 20 C. P. 405. The case of *Freeman v. Cooke*, 2 Ex. 654, is not an authority that the writing to be endorsed on the policy under the condition can be dispensed with by a mere waiver; the waiver must be in writing: *Jacobs v. The Equitable Insurance Co.*, 17 U. C. R. 35, S. C. 18 U. C. R. 14; *The Thames Iron Works and Ship Building Co. v. The Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358. There can be no waiver at law without the writing, according to the con-

ditions: *Morgan v. Couchman*, 14 C.B. 100. This is a mere attempt to sue at law, while the facts shew that the plaintiff's remedy by reason of the alleged waiver, which he relies upon, was at the first of an equitable nature, cognizable only in Equity: *Scott v. The Niagara District Mutual Fire Ins. Co.*, 25 U. C. R. 119; *Lyndsay v. The Niagara District Mutual Fire Ins. Co.*, 28 U. C. R. 326; *Re Bahia and San Francisco R. W. Co. and Trittin et al.*, L. R. 3, Q. B. 584.

WILSON, J., delivered the judgment of the Court.

The declaration contains the allegation of waiver, as an excuse for the non-performance of the literal terms of the third and fourteenth conditions.

The defendants were not obliged to demur to the excuses relied upon. They have the right to deny their truth, and it may have been prudent of them to do so, the right to dispute their sufficiency in point of law being still open to them on the record.

The fifth, eighth, and ninth pleas were properly demurred to, if the plaintiff desired to test their validity in law.

The eighth plea the plaintiff has also replied to, and that has occasioned the difficulty which has arisen on the pleadings dependent upon it.

The replication to that eighth plea sets up an estoppel, by various acts and by verbal declarations also of the defendants, to their right to plead the facts contained in the plea.

And the defendants rejoin, setting up, as an answer to the estoppel, the same defence which they had already made by their ninth plea to the same alleged waiver—that no act of waiver was to be valid which was not made in writing, and endorsed on the policy, and signed by the general agent of the Company in Canada, and that no such waiver had been made by them.

The rejoinder is not the same, but a different form of defence from that which was set up in the eighth plea. *That* relied on the addition to the premises not being allowed by endorsement on the policy, and on a denial of

that endorsement having been waived. *This* asserts that that waiver, which is the one referred to by the estoppel, should not be received to and cannot operate against the defendants by estoppel, because, by another condition of the policy, there can be no waiver of any matter whatever, unless the *waiver itself* is endorsed on the policy, and signed as before mentioned.

It is not a traverse of anything in the estoppel. It is new matter altogether, and it is not a departure, which means, in effect, a retardation of the issue, although I was inclined to think it was. The defendants were not obliged to set out all their case at first. The rejoinder supports the bar. Nor is it a rejoinder by way of estoppel to a replication by way of estoppel, although it might have been so pleaded.

The cases of *Doe v. Wright*, 10 A. & E. 763, and *Darlington v. Pritchard*, 4 M. & G. 783, are instances of pleadings made to a prior estoppel.

It is a pleading by way of confession and avoidance. The defendants say, in effect, to the plaintiff, "You want to conclude us from pleading that the addition to the premises was not allowed by our endorsement on the policy, and from denying that we waived the making of *that* endorsation; but you cannot so conclude us, because, by another condition of the policy, which we now bring forward, the very waiver you speak of, and which you say should conclude us, is to have and can have no operation against us, unless *it*, the act and fact of waiver itself, is expressly endorsed on the policy. Your replication may be true, but from what we now disclose you must answer or avoid the special condition before you can ask us to be estopped from denying the matters which are contained in our plea."

The plaintiff has demurred to the rejoinder. And the defendants in their turn have given notice of exceptions to the declaration, so far as it relates to the third and fourteenth conditions.

It is probable the substance of the matters in dispute in law could have been as well determined on the demurrers to

the pleas, as by the prolonged pleadings for three stages further.

As every pleading from the declaration to the rejoinder has been demurred to, or excepted to, we shall begin with the declaration.

The first averment demurred to is the one relating to the fourteenth condition, which required the plaintiff to deliver in an account in writing of his loss within fourteen days after the fire. The plaintiff admits he did not perform it, because, before the fourteen days had elapsed, the defendants took possession of the premises, and of all the goods and property insured which remained after the fire, and deprived the plaintiff of the possession and control of them, and prevented him from examining the goods and making up a full account of his loss. And the defendants waived the fulfilment of the condition, and discharged the plaintiff from fulfilling the same as a condition precedent to his being paid for his loss.

If this allegation be of a two-fold nature—firstly, that the defendants prevented by their acts the performance of their condition; and, secondly, that the defendants by some means or other, but not by their acts of prevention, waived the due performance of the condition, and discharged the plaintiff from the same—the defendants have not, by their fifth plea, answered the whole of the allegation, but the act of waiver only. The waiver is not stated as a conclusion of law from the preceding facts—“and the defendants *thereby* waived the said condition”—but is stated as a distinct and substantive ground of excuse for the non-performance.

The defendants' fifth plea, “to the first count,” is too large; for the plea, which sets up the non-endorsation of the waiver on the policy, cannot by possibility apply to the excuse by positive acts of prevention on their part, on which the plaintiff relies for his dispensation from a literal performance of the conditions, as well as on the waiver.

There seems, as to such acts of prevention, to be an admission by saying nothing in bar as to them; but the real

defect is, that the plea does not answer all that it professes to answer—not merely by being pleaded to the count, but by setting up a want of waiver in a particular form to a ground of excuse in no way dependent upon the waiver mentioned in the plea.

The plaintiff has demurred to the fifth plea, not on that ground, but having demurred he is entitled to judgment for that defect: *Har. C. L. P. A.*, 114, note (o); 1 *Wms. Saund.*, 23, Ed., 1871; *Eddison v. Pigram*, 16 M. & W. 137

The averment of prevention is a perfect excuse to the plaintiff for not conforming to the condition.

The next averment in the declaration, is the one relating to the third condition.

It alleged that the plaintiff gave notice in writing of every erection, alteration, and extension of and on the premises, and requested the defendants to allow the same in accordance with the conditions * * and that the defendants accepted the notice and waived the endorsement of the same on the policy, and discharged the plaintiff from requiring to have it endorsed, and afterwards continued and confirmed the policy.

Is this a sufficient excuse for not having the necessary endorsement made on the policy, or can there be in law a waiver of such a condition?

Presentment and notice of dishonour are frequently waived, and the waiver allowed as a good excuse for not doing these acts: *Burgh v. Legge*, 5 M. & W. 418; *Woods et al. v. Dean*, 3 B. & S. 101; *Cordery v. Colvin*, 14 C. B. N. S. 374; *Holdsworth v. Dimsdale*, 24 L. T. N. S. 360, and many other cases to the same effect, between the first and last of these decisions.

In *Thompson et al. v. Hudson*, L. R. 4 E. & I. Ap. 1, the acceptance of a mortgage, two days after it was to have been given, was held to be a waiver of the non-delivery at the proper time. See also *Brady v. The Western Assurance Company (Limited)*, 17 C. P. 597; *Wing v. Harvey*, 23 L. J. Ch. 511, S. C. 18 Jur. 394.

It may be conceded that when the contract is by deed

there can be no waiver at law unless by deed : *The Thames Iron Works and Ship Building Co. v. The Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358 ; *Scott v. The Niagara District Mutual Fire Insurance Co.*, 25 U. C. R. 119 ; *Lyndsay v. The Niagara District Mutual Fire Insurance Co.*, 28 U. C. R. 326.

But, whether the instrument be by deed or not, if the matter be by way of a penalty or forfeiture, the one having it in his power to avoid the contract may elect not to do so. It never lies in the power of the party in default to avoid the contract at his pleasure. The cases between landlord and tenant are familiar examples. A deed was held to be valid as against a creditor, who had waived the default of his debtor to insure by accepting a payment under the deed, knowing at that time that the debtor was not then insured : *Hyde v. Watts*, 12 M. & W. 254.

The cases of *Noad et al. v. The Provincial Insurance Co.*, 18 U. C. R. 584, and *Weinaugh v. The Provincial Insurance Co.*, 20 C. P. 405, both having been policies under seal, as they are required to be by the act of incorporation, do not strictly apply here.

In cases under the Statute of Frauds, when the contract must be in writing, it cannot be waived unless by writing : *Noble v. Ward et al.*, L. R. 1 Ex. 117 ; *Goss v. Lord Nugent*, 5 B. & Ad. 58.

In the last case it is said, p. 64, " By the general rules of the Common Law, * * * after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract ; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted on what will be thus left of the written agreement."

In *The Thames Iron Works and Ship Building Co. v. The Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358,

I can understand why the equitable replication failed. The plaintiffs sued upon a deed, and they averred a discharge from one of the conditions of the deed. The meaning of that was, that the plaintiffs were relying on a legal discharge, that is, by deed. The defendants denied that the discharge was by deed. The plaintiffs then replied equitably, that the discharge was by parol. The Court said the replication was a departure. The plaintiffs could not have alleged the parol discharge in the declaration on the deed, for that would have shown an equitable declaration, which is not allowable. And when the declaration does not disclose the discharge or waiver, and that appears first in the replication, by way of equitable answer to a plea of non-performance of the particular condition, that is a departure. And then it is said, the pleadings altogether shew a variation of the deed, not by means of a deed, and the remedy cannot be on the deed, because it has been altered, and unless the plaintiff can sue on the altered deed as a new contract, he has no remedy at law.

It is not necessary to discuss that point, because this policy is not under seal.

In my opinion, the waiver and discharge in the declaration mentioned, as to the third condition, are sufficient. It is a parol discharge to the plaintiff from obtaining performance by the defendants, of an act which they were to do, under an instrument not under seal, and from which in effect they asked to be relieved.

There is no case opposed to this, but *Jacobs v. The Equitable Ins. Co.*, 17 U. C. R. 35, in which it was decided that the equitable replication there pleaded was not a good answer to a plea averring non-performance of a condition precedent. That case is against the general rule of law, which is expressed in *Goss v. Lord Nugent*, 5 B. & Ad. 58, that written agreements may be altered, and to the decision in *Wing v. Harvey*, 23 L. J. Ch. 511, S. C. 18 Jur. 394, that such a condition may be waived, and to the inference to be drawn from the two cases of *Brymer et al. v. The Thames Haven Dock and Railway Co.*, 2 Ex. 549, S. C. 5 Ex. 696,

and *The Thames Iron Works and Ship Building Co. v. The Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358, that, in the case of a deed, the waiver must be by deed; and which waiver "may be either before or after the time when notice ought to be given": Per Cockburn, C. J., in *Woods v. Dean*, 3 B. & S. 106.

The forfeiture may be waived, whether there is a deed or not, and whether it be by deed or not; in which case the contract is to be construed as if that part of it for the particular purpose were struck out. The rest of the contract, whether a condition precedent or otherwise, will remain: *Behn v. Burness*, 3 B. & S. 751-755.

In this case the forfeiture, if got rid of, still leaves a condition precedent to be answered; and that condition the plaintiff says he has shown a good excuse for not performing, and I think he has done so, and that the declaration is sufficient.

The fifth plea has been already disposed of.

The eighth plea is sufficient in law. The chief part of it, it is true, is made up of setting out the third condition, and in reiterating matters already detailed in the declaration; but it concludes with a good traverse, that the defendants did not waive the endorsement of the addition referred to in the policy.

The ninth plea is also sufficient, because it properly disclosed a further reason why the waiver alleged by the plaintiff should not be effectual: namely, that the fact of waiver was required to be verified in a particular form, and that such form had not been observed by the plaintiff.

Then as to the replication of estoppel. It sets out a number of facts, which the plaintiff says together should prevent the defendants from saying the endorsement was not made on the policy, and from denying the waiver of the condition requiring the endorsement.

These facts are,

1. That the plaintiff, immediately on the making of the alteration, did give the defendants notice in writing of the same.

2. That he delivered to them the policy for the purpose of their making the endorsement on it; and also,

3. For the purpose of their endorsing upon it a further assurance made on the premises;

4. That the defendants then accepted the said notice, together with the policy, for the purpose of making these two endorsements on it;

5. That after all these things, the defendants endorsed the fact of further assurance on the policy;

6. That they re-delivered the policy to the plaintiff; and

7. That they then informed the plaintiff that everything which was necessary under the policy and conditions had been done.

The question is, whether these facts lead necessarily to the conclusion that there must have been or that there should be an estoppel. That they may be found by the jury to be an estoppel is true; must they be found to be so by the Court?

In *Smith v. Hayes*, 15 W. R. 871, Ir. Exch. (1867), the action was for an injury to a water-course. There was an equitable plea, that the injury was caused by the making of improvements: that the plaintiff was aware of the same, and that the act which caused the injury would be a part of the improvements: that the plaintiff all the time stood by and witnessed the same without objection, and that his conduct led the defendant to believe, and he did believe, that the plaintiff consented to and approved of the same. The Court held the plea to be insufficient; that the facts did not conclusively amount to acquiescence, but were, at best but inferences of fact. See, also, *Morgan v. Couchman*, 14 C. B. 100.

Here there is more stated,—the giving of the notice and of the policy to have the endorsement made,—the acceptance of the same by the defendants, the endorsement of the further assurance, the re-delivery of the policy to the plaintiff, and the declaration to him that everything necessary under the condition and policy had been done.

If this last statement mean, that the *defendants* had done everything that was necessary, then that declaration, superadded to the previous facts, would make a good estoppel. If the statement mean only that the *plaintiff* had done all that was necessary, the estoppel would not be complete.

I think it may be read as meaning that the defendants had done what they had it in their power to do, to give effect to the purpose for which the plaintiff had given and for which they had accepted the policy.

The cases applicable are the following: *Knights v. Wiffen*, L. R. 5 Q. B. 660, in which case the defendant, an unpaid vendor, lost his right to the goods, because he, on his vendee having sold to the plaintiff, on being shown the transfer to the plaintiff, said, "All right, when you, (the Station Master) get the forwarding note, I will put the barley on the line." It was said by that statement the defendant was estopped; that he had caused the plaintiff to rest satisfied in the belief that the property had passed, and to alter his position by abstaining from demanding the money back he had paid to the original vendee.

In *Wing v. Harvey*, 23 L. J. ch. 514, S. C. 18 Jur. 395, before mentioned, Knight Bruce, L. J., said, to the waiver of a condition of a life policy, "How can he now be re-instated in his position? If he had been informed in 1835, that the forfeiture would be insisted on, he might have insured the life at another office—not so now, the life having dropped."

Freeman et al. v. Cooke, 2 Ex. 654, shows, that representations made by any one for the purpose of inducing another to alter his position, and on which that other does act, are binding on the person making them; and that they may, if they constitute an estoppel, be pleaded as such.

In *Ward v. Day*, 5 B. & S. 357, Erle, C. J., said, at page 362, "When a landlord elects not to take advantage of a forfeiture, and declares to the party against whom he could enforce it that he will not do so, he is bound by that election." Williams, J., said, "The true question in such cases is, whether the landlord affirmed the contin-

uance of the tenancy in that way, in such a manner that he must necessarily have intended it to become known to the tenant, and may be well understood to have acted under the belief that the tenancy was to be continued." See also *Webb et al. v. The Commissioners, of Herne Bay*, L. R. 5 Q. B. 642; *The Bahia & San Francisco R. W. Co. & Trittin*, L. R. 3 Q. B. 584.

The plaintiff must have known at the time he got back the policy that all had not in fact been done by the defendants which they were to do to confirm the policy; but their declaration was intended by them to have some effect. The plaintiff was led to believe, and might well believe, no advantage would be taken of the non-endorsation; and he may have refrained from insuring elsewhere, because he was led to rely upon the policy he had already made.

The replication as an estoppel may be sustained.

Then as to the rejoinder; from what has been said before I think it is good. It introduces new matter, and shows good matter why the replication should not apply.

The defendants are not shown ever to have been asked to make or to give up the written *waiver*; but to make a different kind of endorsement, not a waiver at all, but an allowance of the change made upon the premises.

It is not unlike the case of *Owen v. Reynolds*, Fort. 341, referred to in the earlier editions of *Stephen on Pleading*. In debt conditioned to indemnify the plaintiff from all tonnage of coals due to W. B., the defendant pleaded *non damnificatus*. The plaintiff replied, that for £5 of tonnage of coals due to W. B., his barge was distrained. The defendant rejoined, that no tonnage was due to W. B. for coals. The plaintiff demurred for departure. The Court held the rejoinder good, for the defendant was not obliged to set out all his case at first, and it sufficed that his bar was strengthened and supported by the rejoinder.

The rule against departure is said to be, to prevent the retardation of the issue, and an almost indefinite length of of altercation.

The defendants said, in their plea, they did not waive the making of the endorsement required by the third condition. The plaintiff desires to estop them from denying the waiver of that endorsement. The defendants rejoin, they should not be estopped by those acts in the replication mentioned, which are not in writing, because there is a condition which declares that no act of waiver shall be valid which is not in writing. That rejoinder supports and strengthens the plea, and it is therefore good in law.

The defendants are entitled to judgment on demurrer to their rejoinder, and on the demurrers to their eighth and ninth pleas; and the plaintiff is entitled to judgment on the demurrer to the fifth plea.

It would scarcely be right to pass over some notice of the wonderful structure and scope of the fourteenth condition. It has been set out in full, and its numbers, (although the numbers are not in the condition itself) thirty-six prerequisites which must be complied with before the insured can demand his money.

Beside furnishing an account of the loss, in the most precise manner, and verifying the same by books and vouchers, and oath, and giving the names and residences of all persons interested in it, and of all incumbrances which affected the property, and getting the special certificate of two Magistrates, the assured is to submit to an oral examination, and to answer on oath and to subscribe the same if required;

And, where practicable,—and it would be hard to convince the Company, if tempted to abuse the power they have under the conditions, that in every case it was not practicable,—to verify the statement of loss by the testimony of his domestics, servants, or other persons in his employ;

And in case of real property or fixtures, he is to produce his title deeds, and an abstract from the registry office. And he is to supply such other vouchers, &c., &c., as may *reasonably* be required, to prove his loss and his right to be paid. And until all that is done, and done in three

months, time being of the essence of the contract, no money is to be paid.

Then, if in all this there is anything contrary to the 30th, 31st, or 32nd branches of the condition, the policy is to be void.

This is a degree of inquisitorial power, under the penalty of a forfeiture of the insurance money, which it is vexatious and difficult to comply with, and which is about equal to a forfeiture of itself, and almost a perfect immunity to the insurers against their ever paying the money.

They could, if so disposed, probably cut out work enough for the assured for at least a twelvemonth, before he could be done with his further explanations, or servants testimony or the other multifarious devices provided for him; and if it did take more than three months, time being of the essence of the contract, so much the worse for the assured.

The conduct of Companies, when enforcing rigidly such conditions, has often been complained of by the Courts—by reason of the number and nature, and difficulty of the conditions they introduce into their policies; and the time perhaps has come when the legislature should interfere, to stand between them and those they insure or pretend to insure, or, in other words, the public, by limiting them to such conditions which the Courts shall determine to be reasonable.

That the Companies are often imposed upon by wilful fires, and by very fraudulent conduct on the part of the assured, is too well known. But how far the Companies may be answerable for some portion of that blame, from the loose way in which they gather up their risks, by agents who are travelling everywhere in quest of them, and who may look chiefly to the number and extent of them, as it is upon the amount taken they get their commission, instead of making the character of the party and the value, nature, and situation of the property, the basis of the contract, must also be considered.

However these matters may be, it is quite manifest,

the adoption of such conditions and provisions as these is not the proper remedy. They damage the honest man perhaps more than the dishonest one. The proper cure for common and gross dishonesty on the part of those who insure is, that the Companies shall be more careful in selecting those with whom they wish to deal.

The public will be better served, for with a better class of risks the rates will be lower. There will be fewer fraudulent claims made. The fair dealing man will get his money when he reasonably shews he has the right to it, and the Companies will be relieved from the temptation of not paying under the cover of their embarrassing conditions.

As the Companies have not adopted, and are not likely to adopt of their own accord, that mode of doing business, the only way is to force it upon them by the Legislature enabling the Courts to prohibit and restrict their conditions. And when that is done, the Companies will be obliged to be more careful of the risks which they take.

At present it is a mere system of attack and defence. The more fraudulent or felonious the attack, the more numerous, complicated, and guarded the defences are. But that is a war calculated only for two very special classes of persons. The honest people are lost sight of, and suffer in the conflict.

The object should be, to restore this invaluable protection when honestly administered to its legitimate and mercantile character and purpose, and that will have to be done by legislation unless the Companies will modify their conditions.

Judgment for plaintiff, that the first count is sufficient in law, and on demurrer to the 5th plea, and on the demurrer to the replication to the eighth plea, and for defendants on demurrer to the rejoinder to the replication to the eighth plea, and to the 8th and 9th pleas.

NEWTON (Assignee of Todd, an Insolvent) v. GORE
DISTRICT MUTUAL FIRE INSURANCE COMPANY.

Fire Insurance—Over-valuation.

In an action on a Mutual Fire Insurance Policy for \$1,800, upon goods which the insured, at the time of insuring, estimated at a cash value of \$4,500, the jury were asked, among other questions, "Did T (the insured) reasonably and actually believe that such stock in trade was then of the fair value of \$4,500." They answered: "We cannot believe that he could think such a thing;" but said, when they handed in their answers, that they wished the verdict to be entered for \$1,100, which they found to be the loss sustained:

Held, following *Riach v. Niagara District Mutual Fire Insurance Co.*, 21 C. P. 464, that on the finding defendants were entitled to succeed, and a nonsuit was ordered.

ACTION on a fire policy effected on goods by one Todd, an insolvent.

Pleas,—2. Goods not destroyed by fire.

3. That defendants were induced to make the policy by the fraud of Todd and others in collusion with him.

5. Misrepresentation by Todd in his application for insurance, in untruly stating the value of the goods to be \$4,500, instead of \$1,700.

6. False swearing of Todd in attempting to give a detailed account under oath with intent to defraud in stating the value of goods destroyed as \$3,206.95, instead of \$1,700; &c. Issue.

The case was tried before Gwynne, J., at the last Spring Assizes held at Guelph.

The amount insured on the goods was \$1,800, upon an estimated value, at the time of the insurance of the goods, being of the then cash value of \$4,500,

After the evidence was closed on both sides, the learned Judge left the following questions to the jury to find, and to which they returned the following respective replies: 1st. Was the policy effected upon the representation of one Dennis, that he was a partner with Todd, and did the Company accept the risk upon the faith of such representation. Ans. "We agree that it was through the representation of Dennis."

2. "Was the sum of \$4,500 a fair estimate of the actual cash value of the leather stock in trade upon which the \$1,800 risk was taken, at the time the policy was accepted; and if not, what was such actual cash value at a fair estimate?" Ans. "We would state the sum of \$1,000."

3. "Did Todd reasonably and actually believe that such stock-in-trade was then of the fair value of \$4,500?" Ans. "We cannot believe that he could think such a thing."

4. "What is a fair estimate of the actual loss which was sustained on machinery insured?" Ans. "\$200."

5. "What was the amount of actual loss sustained on the leather and stock-in-trade?" Ans. "\$900."

The learned Judge was about entering a verdict for the defendants, upon the jury handing in these answers; but, being appealed to, they said it was their wish that the verdict should be entered for the \$1,100, when the learned Judge entered a verdict for the plaintiff, reserving leave to defendants to move to enter either a nonsuit or a verdict for the defendants.

During Easter term *Lash* obtained a rule *nisi* accordingly to enter a verdict for defendants, or a nonsuit.

During this Term *McMichael*, Q. C., shewed cause. The plaintiff believed he gave the true value of the goods when he insured them. The jury have answered that he actually gave an improper value, but no fraud was shewn, and the verdict should not be interfered with. The jury, by their answers, have determined the loss to be \$1,100, and the verdict is for that amount only. He referred to *Fowkes v. The Manchester and London Assurance Co.*, 3 B. & S. 930; *Benham v. United Guarantie and Life Assurance Co.*, 7 Ex. 745; *Laidlaw v. The Liverpool and London Insurance Co.*, 13 Grant 377; *Britton v. The Royal Insurance Co.*, 4 F. & F. 905.

W. N. Miller, contra. By the application, which by the terms of the policy forms part of it, the amount which the defendants pay in case of fire is at most but two-thirds of the cash value of the goods insured. Here that value was put

by the jury at \$1,000. The verdict was, therefore, too large: *Williamson v. Gore District Mutual Insurance Co.*, 26 U. C. R. 145. It is not necessary that the misrepresentation should be fraudulent: it is sufficient if the value has been improperly given: *Riach v. Niagara District Mutual Fire Insurance Co.*, 21 C. P. 464.

MORRISON, J.—Upon this finding of the jury we are of opinion that, upon the authority of the case of *Riach v. The Niagara District Mutual Fire Insurance Co.*, 21 C. P. 464, the defendants are entitled to succeed, and that the rule should be made absolute to enter a nonsuit.

Rule absolute.

THE ATTORNEY GENERAL V. HARRIS.

Information for intrusion—Pleading.

To an information of intrusion, filed by Her Majesty's Attorney General for the Dominion, prosecuting for her Majesty, the defendant pleaded that the lands mentioned were not Ordnance property or property in any manner under the control of the Dominion of Canada, but, on the contrary thereof, the said lands became upon the passing of the B. N. A. Act, 1867, and still are the property of the Province of Ontario, in which they are situate.

Issue having been joined on this plea, the title at the trial was gone into, and a verdict entered for the Crown, with leave to defendant to move to enter it for him.

Held, that the Crown was clearly entitled to recover, for (among other reasons) the plea set up no title in defendant, and admitted the Crown title by stating the lands to belong to this Province; and the fact of the Attorney General for Canada prosecuting for the Crown, could not shew that a Dominion title was necessarily claimed.

Remarks upon the form of, and defects in, the *Nisi Prius* record.

INFORMATION of intrusion into lands of the Crown, situate in the county of Welland, in the Province of Ontario, filed by the Honourable Sir John Alexander McDonald, Her Majesty's Attorney General for the Dominion of Canada, and who prosecutes the same for Her Majesty.

The defendant pleaded that he ought not to be called upon to answer the said information, because he says that the parcels of land and premises therein mentioned and

described are not Ordnance property, or property in any manner under the control of the Dominion of Canada, but, on the contrary thereof, the said parcels of land and premises became, upon and from, and after the passing of the British North America Act, 1867, the property and still are the property of the Province of Ontario, in which the same were and are situate; and this the defendant is ready to verify.

To that was replied that Her Majesty's Attorney General, who for our Sovereign Lady the Queen prosecutes in Her behalf, as to the plea of the defendant Henry Harris, and whereof he puts himself upon the country, doth the like.

The cause was entered for trial at the Assizes for the County of York, in January, 1872, and was made a *remanet* till the Spring Assizes, when it was tried before Hagarty, C. J., C. P.

The *Nisi Prius* Record was made up in the former ordinary form, shewing an award of *venire facias*, and with the usual *Nisi Prius* clause, but the trial was without a jury.

The title to the land was gone into, and it was agreed the verdict should be for the Crown, with leave to the defendant to move to enter it for him, if the Court should think he was entitled to the verdict.

In Easter Term last, *Harrison*, Q. C., obtained a rule calling on the plaintiff, his attorney or agent, to shew cause why the verdict, pursuant to leave reserved, and to the Law Reform Amendment Act, should not be entered for the defendant, on the ground that the property in question became upon, from and after the passing of the British North America Act, 1867, the property of the Province of Ontario, and the learned Chief Justice who tried the cause, should so have ruled, and entered the verdict for the defendant; and this, notwithstanding the improper admission as evidence of a certain deed and a certain extract, purporting to be signed by William J. Coffin, neither of which was proved and which should have been rejected; or why, upon the grounds aforesaid, or some of them, the

verdict should not be set aside, and a new trial had between the parties, for misdirection of the Chief Justice, and improper reception of evidence.

During this term, *Bain*, for the Crown, shewed cause. The plea has been put in under the British North America Act, 1867. As to the form of pleading he referred to *Manning*, Ex. Pr. 198; as to Ordnance lands, to B. N. A. Act, sec. 108; as to proof of the document signed by Colonel Coffin, to 23 Vic. ch. 2, sec. 30; Dominion Act, 31 Vic. ch. 42, secs. 34 and 35.

Harrison, Q. C., supported the rule. The cause has been tried without a jury under the Law Reform Act. The Crown, though not named in the Act, may adopt the benefit of it. All the lands but those mentioned in section 108 of the Confederation Act, are vested in the Provinces in which the lands are situate. The 7 Vic. ch. 21, was the Ordnance Vesting Act. The 19 Vic. ch. 45, transferred the ordnance property to the Province. The land in question, the one chain in width along the Niagara river, at the Village of Fort Erie, is not ordnance property within the 19 Vic. ch. 45. A special quantity of 1000 acres was transferred by that Act, and the chain in question along the river is not within that quantity. The certificate of Col. Coffin, was not a document admissible in evidence. It was not given by the proper officer, nor could such a document be certified.

WILSON, J.—The statute of 21 Jac. I. ch. 14, provides that “whosoever the king, and such from or under whom the king claimeth, and all others claiming under the same title under which the king claimeth, shall have been out of possession by the space of twenty years, * * before any information of intrusion brought or to be brought to recover the same, in every such case the defendant may plead the general issue if he so think fit, and shall not be pressed to plead specially, and in such case the defendant shall retain the possession he had at the time of such information exhibited until the title be tried, found, or adjudged for the king.”

Before that statute, on the plea of the general issue, the fact of trespass or intrusion only was in issue, and as the Crown title was not denied, it was entitled to oust the defendant and take immediate possession. By this statute the defendant is not to be disturbed in his possession, although he plead only the general issue, unless the Crown has been in possession within twenty years before the information filed.

That fact need not appear on the record. Whenever the Crown shews by evidence a possession within twenty years, then under the general issue, when that only is pleaded, the Crown becomes entitled to the possession, whether the fact of intrusion is proved or not: *Attorney General v. Parsons*, 2 M. & W. 23; *Attorney General v. Hallett*, 1 Ex. 211.

This plea, which is a very extraordinary one, does not deny the intrusion, nor does it set up title in the defendant, nor does it profess to deny the title of the Crown.

Properly the defendant cannot deny the Crown title at any time or in any form, unless by showing a counter or better title in himself. And even then the Crown may pass over its own title which is thus traversed, and traverse the one set up against it: *Rex v. Robert The Bishop of Worcester*, Vaughan, 62; *Attorney General v. Hallett*, 1 Ex. 211.

The Crown is therefore entitled to judgment for the recovery of the land on the record as it stands at present.

The plea, which asserts that the land is not ordnance property, or property in any manner under the control of the Dominion of Canada, but is by the British North America Act of 1867 the property of the Province of Ontario, is bad therefore, if it is to be considered a denial of the Crown title; but it is not a denial.

It is bad if it is to be considered as a denial of the land being Ordnance land, for even if a defective title be stated, the Crown may abandon it and stand on its prerogative title, and compel the defendant to show title: *Leigh v. Hudson*, 2 Dyer 238 b.

And so it is bad if it is held to be a denial of the land

being under the control of the Dominion of Canada. And the assertion that the land is the property of the Province of Ontario is a direct admission of the title of the Crown.

How that question becomes material in an action against this defendant, who has no title at all, and who cannot by possibility raise it unless he assert and trace title under the Province of Ontario—that is, from the Crown—it is impossible to tell.

It is almost as difficult to tell how it can be known or surmised that Her Majesty, by reason of a Dominion title, is claiming the land, unless it be from the fact that the information is filed and prosecuted by the Attorney General for the Dominion of Canada, for and on behalf of Her Majesty.

But the fact that the Attorney General for Canada prosecutes for the Crown does not show that a Dominion title is necessarily claimed. It does show, no doubt, that the Attorney General for Canada is the attorney who sues for Her Majesty; but how that can be pleaded to, I do not understand. He may or may not, judicially be, so far as we know, an officer of this Court; I mean an attorney of the Court. If he be, I do not know why Her Majesty may not specially authorize him to sue for her. If he be not, there must be some other way of reaching it. But why Her Majesty may not be represented by Her Attorney General for Canada on an information for intrusion into her lands, which *may be* lands belonging to the Dominion, notwithstanding any different statement as to them contained in the information, so long as the defendant does not show conclusively, by a title set forth, that he, or those from whom he derives his right, has or have an Ontario or some other opposing right, I do not comprehend.

If the Solicitor General proceed in place of the Attorney General, it is not a ground of error. "While the principal avows him, neither the adverse party nor the Court can dispute his authority. * * * There are many entries in *Rastall* which show that at the Common Law others than the Attorney General have sued for the King, or, in other

words, the King has sued by others as his attorneys. * * In every light and in every view the objection is groundless." Per Lord Mansfield in *Rex v. Wilkes*, 4 Burr. 2553-2555.

If the lands belong to the Crown, Her Majesty must be entitled to recover them by prerogative, no matter by what title she holds them; *The Attorney General for the Prince of Wales v. St. Aubyn*, *passim*, Wightw. 242-259.

I may refer to some cases which have a general bearing on this subject: *Penn v. Lord Baltimore*, referred to in *Nabob of the Carnatic v. East India Co.*, 1 Ves. 384, and in *White & Tudor's Leading Cases*; *Holmes v. Regina*, 8 Jur. N. S. 76; *Re the Bishop of Natal*, 11 Jur. N. S. 353; *The Queen v. Hughes*, L. R. 1 P. C. 81; *Bishop of Natal v. Gladstone*, L. R. 3 Eq. 1.

The Crown officer should not have suffered such a plea to be pleaded. But issue was joined upon it, and the formality of a trial gone through with about the Crown title, as well as I can make out.

There are some defects of so manifest a description on this record that they cannot be passed over. The *Nisi Prius* Record, which is made up as such records were usually prepared before the change was effected in the practice—whether it should have been so made up we do not enquire,—begins with the first *placita* of Michaelmas Term, in the 35th year of Her Majesty's reign, 1872, while as issue was joined, or professed to have been joined, on the 29th of December, 1871, the *placita* should have been of the year 1871, and not of 1872. The venue is laid in the margin in the County of York, while the land is situate in the County of Welland, and there is no suggestion, or rule, or order to change the place of trial or to change the venue.

The Crown has no prerogative to try in any county it pleases, or to lay the venue in any other county than that in which the land lies: *The Attorney General v. Lord Churchill*, 8 M. & W. 171.

The plea concludes with a verification, and the replication says that the plea whereof the defendant "puts himself upon the country doth the like."

The second *placita* is of the last of Michaelmas Term, in the 34th year of Her Majesty's reign, and in the year 1871, while it should have been the 35th year.

The *jurata* respited the jury until the first of Hilary Term next, unless the Judge first came on the 8th of January, 1872, which I shall assume to be right, though Hilary Term *next* will give a wrong year. The cause at that January Assizes was made a remanet, and it was entered and tried at the following York Assizes, but without any change in the award of *venire facias* or *placita*, or *jurata*.

There was a verdict rendered for the Crown. We shall leave it, as on the grounds mentioned in the rule the title cannot be and is not drawn into question.

The Crown must get judgment as to the possession at all events. It is for the Crown officers to get the benefit of the defendant's insufficient, idle, and objectionable plea. "A Court of law could not give judgment, nor can this Court decree against the title of the Crown appearing upon the record." Per The Lord Chancellor in *Barclay v. Russell*, 3 Ves. 436; see also *Yates v. Dryden*, Cro. Car. 589, 590.

We discharge the Rule.

Rule discharged.

HAMILTON ET AL. V. MOORE.

Building Contract—Penalty or liquidated damages—Work delayed by defendant—Pleading.

Plaintiffs agreed to do certain iron work on a building for defendant, and to finish it on or before 1st of July, 1871, "under a forfeiture of \$50, as liquidated damages, for every week the work remains unfinished after the said time."

Held, that the \$50 per week was liquidated damages, not a penalty. In an action on the common counts for such work, defendant pleaded that the work was done under the above agreement, and that the plaintiffs, in violation of the agreement, and without any default of the defendant, did not complete the works by the day appointed, and that defendant, under the agreement, was entitled to deduct \$1207 for the delay. The plaintiffs joined issue. *Held*, that the plaintiffs, under this issue, could not show that the delay was caused by the defendant or by other workmen of his; but a new trial was granted, with leave to amend; and *Semble*, that the plaintiff should reply specially the nature of the delay caused by defendant.

DECLARATION on the common counts. The action arose out of a building contract, by which the plaintiffs cove-

nanted "to do all and singular the following works: viz, two hoisting machines, complete; wrought iron railing on roofs; interior cast iron columns; wrought iron for sidewalks, including gratings, bars, bolts, &c., also cast iron pivots, basement columns, and gutters, fixing the same as required in the erection of warehouse buildings."

One of the pleas was, that the work sued for was done under an agreement in writing, for which the defendant was to pay the plaintiffs \$3,025, and that the work was to be done before the first of July, 1871, under a forfeiture of \$50 as liquidated damages for every week the work should remain unfinished after that day. And the defendant was only to to pay to the plaintiffs the sum of \$3,025, subject to any deduction for the non-fulfilment by the plaintiffs of their agreement. And the plaintiffs, did not finish their agreement for twenty-four weeks and one day after the time fixed, whereby the defendant became entitled to deduct \$1,207 for the delay.

Issue.

The cause was tried at the last Spring Assizes for the County of York, before Hagarty, C. J. C. P., when a verdict was rendered for the defendant, upon the ground that the sum in question was a deduction of a liquidated sum, and not a penalty, that being the only sum in dispute.

The learned Chief Justice ruled that the delay caused to the plaintiffs by the defendant, or by other workmen of defendants, could not be gone into on the issues on the record,—a mere joinder, or taking issue on the plea.

By the agreement referred to, the plaintiffs agreed to finish the work for which they had contracted, on or before 1st of July next, "under a forfeiture of \$50, as liquidated damages for every week the work remains unfinished after the above time."

In Easter Term last, *McMichael*, Q. C., obtained a rule on the defendant to shew cause why the verdict should not be set aside, on the ground that the verdict was contrary to law and evidence, and for misdirection. The

grounds of objection were, that the plaintiffs having fulfilled their contract, and finished their work, the agreement as to delay could not be treated as liquidated damages, but as a penalty; and the defendants had no right to set off the amount claimed as liquidated damages.

During this term, *Ferguson* shewed cause. The defendant's rent is \$2,000 a year for the building, which the plaintiffs delayed in finishing; the allowance of \$1,200 for the 24 weeks delay, is very little more than the rent he actually lost. The defendant had paid the balance, or rather over-paid it by \$9.

The defendant, by his agreement, had the right to insist on the deduction as liquidated damages: *McPhee v. Wilson*, 25 U. C. R. 169; *Fisher v. Berry*, 16 C. P. 23; *Fletcher v. Dycke*, 2 T. R. 32; *Legge v. Harlock*, 12 Q. B. 1015; *Thornhill et al. v. Neals*, 8 C. B. N. S. 831; *Reynolds v. Bridge*, 6 E. & B. 528, S. C. 2 Jur. N. S. 1164; *Leighton v. Wales*, 3 M. & W. 545; *Reilly v. Jones*, 1 Bing. 302 (a).

It was not enough to show that the plaintiffs were delayed by other contractors, they should have shown that they were delayed by the defendant himself. The architect would, as appeared from his evidence, have given an award for the whole sum of \$1,200.

If the plaintiffs were delayed by the defendant, or by his other workmen, he should have replied that; it was not in issue.

M. C. Cameron, Q. C., and *McMichael*, Q. C., supported the rule. The cases cited, it will be found, are founded on agreements differently expressed from the one here. In *McPhee v. Wilson*, 25 U. C. R. 169, which was an action for non-delivery of goods, there was a provision that the time should begin to run upon the non-delivery of the whole or any part of it. "The covenant here amounts to this, that a reasonable deduction shall be allowed. Where several things are to be performed, and only one is left unperformed, the penalty will not

(a) See also *Archbold v. Wilson*, 32 U. C. R. 590.

attach. [WILSON, J.—That is where there are different degrees of importance in the things to be done, and that left undone is of minor importance.] The other contractors had not their works at the building ready to have enabled the plaintiff to do his portion of it, the iron work to it. We gave no undertaking to pay damages for delay from such a cause. The whole delay which the plaintiffs really caused was two weeks. The evidence showed that if the plaintiffs had done all their work by the time fixed, the defendant would not have got his house four weeks sooner. The fact of the plaintiff having been so delayed was in issue, because the plea alleged that the plaintiffs delayed the works, without any default on the part of the defendant. But if that fact be not in issue, the plaintiffs should be allowed to reply it specially, because the plaintiffs are not justly liable to the deduction made: *Russell v. Sa Da Bandeira*, 13 C. B. N. S. 149. As to what is a penalty, they referred to *Betts v. Burch*, 4 H. & N. 506; *Mercer v. Irving*, E. B. & E. 563; *Reindell v. Schell*, 4 C. B. N. S. 97.

WILSON, J., delivered the judgment of the Court.

The cases of *Fletcher v. Dycke*, 2. T. R. 32; *Legge v. Harlock*, 12 Q. B. 1015; *Fisher v. Berry*, 16 C. P. 23; *Russell v. Sa Da Bandeira*, 13 C. B. N. S. 149, all shew this sum of \$50 in the agreement in question is a liquidated demand, and may be set off.

In *Reynolds v. Bridge*, 6 E. & B. 528, at p. 541, it is said by Coleridge, J., "The principle seems to be that, if you find a covenant the breach of which will occasion a damage not uncertain, but such as is capable of being ascertained, as where there is a particular sum to be paid which is much less than the sum named as payable upon the breach, there it is held that the last named sum is specified by way of penalty, because a Court of Equity would limit the amount to be actually paid."

Erle, J., said, "From the nature of the contract, the damages for the breach of it are clearly undefined. * * They

are therefore undefined, and it is clear that in such case the covenantee is to have the £2,000."

Acting upon that rule, we must say the damages per week for the non-performance by the plaintiffs of their work, were quite undefined. We cannot, in the face of an express agreement by the parties fixing what they shall be, declare that they may or must be more or less, or otherwise than they themselves have stipulated. We think that is the effect and tendency of all the later decisions, to permit the parties to understand and to make their own bargains, and to arrange their own business as they please, so long as they deal fairly and contravene no rule of law.

Then it is said the defendant and his other workmen hindered the plaintiffs from performing their work in time.

That the plaintiffs' delay did not stop the completion of the building can, I think, be of no consequence. That others were in fault as well as themselves, cannot help the plaintiffs. The question is, did the plaintiffs do what they had engaged to do within the time specified? If they did not, and the defendant is not answerable for the delay, the plaintiffs must answer for it. If the defendant were the cause of the delay, the plaintiffs should not be liable.

There is evidence, which was rejected because beyond the issue, it was said, which was tendered for the purpose of shewing that the plaintiffs were delayed by the defendant's architect in furnishing or in changing the patterns for the iron work. And it was said the building was not ready, so that the iron work could be put up by the first of July.

The question is, is evidence of that character within the issue?

The plea alleges, "that the plaintiffs, in violation of their agreement, and without any default of the defendants, did not complete the said works by the said first day of July," and the plaintiffs join issue on the plea.

That form of joinder of issue shall be deemed to be a denial of the substance of the plea: Common Law Procedure Act, sec. 108.

What, then, is the substance of the issue? It is, whether the plaintiffs, in violation of their agreement, did or did not complete the work by the time fixed. It is not, whether they did so or not with or without the default of the defendant.

If the plaintiffs had specially replied, that they did not fail to perform the work without the default of the defendant, and issue had been joined on that replication, the plaintiffs would have been at liberty to have shewn that their failure had resulted from the act of the defendant. That seems to be the very point decided in *Lush v. Russell*, 5 Ex. 203.

It is not every statement that is a traversable or material allegation: *Rundell v. Shell*, 4 C. B. N. S. 97.

It is likely that the plaintiffs might be prevented from replying in the manner indicated, as it might be embarrassing, and that they would be required to reply in a plain manner, charging the delay upon the defendant by reason of his not furnishing, or by his changing the plans for the plaintiffs' work, or by his not having had the building sufficiently in progress or fit for the plaintiffs' work; for if the defendant had not his work ready for the plaintiffs by the time they were entitled to it, to do their work, he cannot recover against them, although they were not ready to proceed with their work.

The plaintiffs' rule does not specifically include this as a ground for interference, but we think as the sum is in ordinary language a penalty, or, in the language of the agreement, a forfeiture, though of a fixed amount, and as it is more than one-third of the whole contract price, it is but equitable the plaintiffs should be allowed to give whatever evidence they can upon the point.

The rule will be absolute, setting aside the verdict, and for a new trial, on payment of costs by the plaintiffs within one month, and with leave to apply to amend their pleadings.

Rule accordingly.

CORNWALL V. THE QUEEN.

32-33 Vic. ch. 20, sec. 69—*Forcible seizure and kidnapping—Criminal trial before County Judge—Form of record of judgment—Postponement of trial—Amendment—Error.*

The plaintiff in error having been committed to gaol for trial on a charge of unlawfully and forcibly kidnapping and taking one Bratton without authority, with intent to transport him out of Canada against his will, was, on the 24th of June, 1872, brought before the County Judge, by whom he consented to be tried under the 32-33 Vic. ch. 35. In the record drawn up under that Statute, it was charged that he did feloniously and without authority, forcibly seize and confine one B. within Canada, &c. (without alleging any intent), and that he did afterwards feloniously kidnap one B. with intent to cause the said B. to be unlawfully transported out of Canada against his will, &c. The Judge fixed the 3rd of July, for the trial, and on that day the prisoner said he was ready, but upon the request of counsel for the Crown, the trial was postponed till the 15th of July, when the prisoner was found guilty on both counts. An amendment of the indictment was allowed by the Judge, changing the name of Rufus Bratton to James Rufus Bratton. In the notice required from the Sheriff to the Judge, by 32-33 Vic. ch. 35, sec. 2, only the charge contained in the second count of the indictment was referred to.

On errors being assigned, *Held*, that the Sessions had jurisdiction over the offence, and so the County Judge had power to try it.

Held, that the record was properly framed, in stating the offence charged in such form as the depositions or evidence showed it should have been; and that the Judge's jurisdiction was not confined to the trial only of the charge as stated in the commitment.

Held also, that the Judge had power to postpone the trial, and the record was not defective in not stating the cause of the adjournment.

By 32-33 Vic. ch. 20, sec. 69, under which the charge was made, "Whosoever, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent" to cause such person to be secretly confined or imprisoned in Canada, or to be unlawfully sent or transported out of Canada, against his will, or to be sold or captured as a slave, is guilty of felony. *Held*, Wilson, J., dissenting, that the intent required applied to the seizure and confinement in Canada, as well as to kidnapping; and that the first count therefore was defective in not stating any intent.

Upon this ground the judgment was reversed, and under C. S. U. C. ch. 113, sec. 17, the record was remitted to the judge to pronounce the proper judgment, which would be upon the second count only.

Held also, that the amendment was authorized, under 32-33 Vic. ch. 29. secs. 1 and 71, Dom.

Held also, that the Court would not presume that the two counts refer to the same offence, and if it were so, duplicity would not be a ground of error.

Held also, no objection that the jurisdiction conferred by 32-33 Vic. ch. 35, was not shewn, for the record and judgment were in the form prescribed by that Act.

Held also, that the Sheriff's notice was sufficient, as 32-33 Vic. ch. 35, sec. 2, requires it only to state the "nature of the charge" preferred against the prisoner.

The prisoner having been sent to the Penitentiary, a *habeas corpus* was ordered to bring him up to receive the proper judgment.

ERROR—The writ of Error was as follows :

“IN THE QUEEN’S BENCH, } Victoria by the Grace of God,
Province of Ontario, } &c.

To Wit : } To William Elliot, Esquire, Chairman of the Court of General Sessions of the Peace in and for the county of Middlesex—*Greeting* :

Because, in the record and process, and also in the giving of judgment of a certain indictment against Isaac Bell Cornwall, of a certain felony, which states that he, the said Isaac Bell Cornwall, on the 4th day of June, A.D., 1872, at the city of London, in the said county, did feloniously and without lawful authority, forcibly seize and confine one Rufus Bratton within Canada, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown and Dignity ; and for that he, the said Isaac Bell Cornwall, afterwards, to wit, on the day and year last aforesaid, without lawful authority did feloniously kidnap one Rufus Bratton to be unlawfully transported out of Canada, against his will, against the peace of our Lady the Queen, Her Crown and Dignity, whereof the said Isaac Bell Cornwall, between us and the said Isaac Bell Cornwall, before you, is thereupon convicted, as it is said manifest error hath intervened, to the great damage of the said Isaac Bell Cornwall, as by his complaint we are informed.

We being willing that the said error, if any, be duly answered, and full and speedy justice done to the said Isaac Bell Cornwall in this behalf, do command you that if judgment be thereupon given, then you send to us, distinctly and plainly, to our Court of Queen’s Bench at Toronto, under your seal, the record and process aforesaid, with all things touching the same and this writ, so that we may have them on the twelfth day of November, instant ; that in inspecting the record and process aforesaid, we may cause further to be done thereupon for amending the said error, as of right and according to the law and custom of Ontario, shall be meet to be done.

Witness—The Honourable William Buell Richards, Chief Justice, &c., this 7th day of November, A.D., 1872.

(Signed) ALAN CAMERON.

W. H. Bartram, Attorney for plaintiff in error.”

The following return was endorsed on the writ :

"The Execution of this writ appears in certain schedules hereunto annexed, marked A, B, C, D and E, respectively.

(Signed) WILL. ELLIOT,
Chairman, Sessions Gen'l, Middlesex.

Witness.

(Signed) Charles Hutchinson, }
Clerk of the Peace,
County of Middlesex." }

The schedules, were as follow :—

" SCHEDULES.

A.

"County of Middlesex, } I, William Elliot, Esquire, Chair-
To Wit: } man of Her Majesty's Court of
[L.S.] } General Sessions of the Peace, in
and for the county of Middlesex, by virtue of the annexed writ to be delivered, do send to our Lady the Queen, distinctly and openly, under my seal the record and proceedings of a certain conviction made against Isaac Bell Cornwall, of which mention is made in the said writ, together with all things concerning the same.

In witness whereof I, the said William Elliot, have to these presents set my hand seal, the twelfth day of November, in the 36th year of the reign of our Sovereign Lady Queen Victoria, and in A.D., 1872.

(Signed) WILL. ELLIOT, Chairman."

B.

"Province of Ontario, } In the County Judge's Crimi-
County of Middlesex. } nal Court, in and for the county
To Wit: } of Middlesex.

Be it remembered that Isaac Bell Cornwall, being a prisoner in the jail of the said county, committed for trial on a charge of having on the fourth day of June, 1872, at the city of London, in the said county, feloniously and without lawful authority, forcibly seized and confined one James Rufus Bratton within Canada, against the form of the statute in such case, made and provided, and against the peace of our Lady the Queen Her Crown and Dignity; and of having afterwards, to wit, on the day and year last aforesaid, at the city and county aforesaid, without lawful authority, feloniously kidnapped one James Rufus Bratton with intent to cause the said James Rufus Bratton to be unlawfully transported out of Canada, against his will,

against the form of the statute in such case made and provided. and against the peace of our Lady the Queen, Her Crown and Dignity; and being brought before me, William Elliot, Esquire, Judge of the County Court of the said county of Middlesex, on the twenty-fourth day of June, 1872, and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried, and pleaded not guilty; and thereupon I appointed the third day of July, 1872, for his trial on the said charges: that upon the said third day of July, 1872, the said Isaac Bell Cornwall, being again brought before me for trial, declared himself ready, and on the application of counsel for the Crown, the trial was then postponed until the fifteenth day of July, 1872, on which day the said Isaac Bell Cornwall was again brought before me for trial; and after hearing the evidence adduced, as well in support of the said charges as for the prisoner's defence, I find him to be guilty on both counts of the offence with which he is charged as aforesaid, and I accordingly sentence him to be imprisoned in the Provincial Penitentiary for the period of three years, and to be then discharged.

Witness my hand at London, in the said county of Middlesex, this fifteenth day of July, 1872.

(Signed) WILL. ELLIOTT,
Judge, County Court, Middlesex."

C.

ACCUSATION.

"In the County Judge's Criminal Court for the County of Middlesex.

Province of Ontario,	}	The twenty-fourth day of June,
County of Middlesex.		
<i>To Wit:</i>	}	A.D., 1872, at London, in the County of Middlesex, before Wil-
liam Elliot, Esquire, County Judge of the said county,		

exercising criminal jurisdiction under the provisions of the Act entitled "An Act for the more speedy trial in certain cases of persons charged with felonies and misdemeanors in the Province of Ontario and Quebec," Isaac Bell Cornwall, who is committed for trial to the common jail of the said county, and is now a prisoner in close custody therein, stands charged this day before the said Judge sitting in public open Court assembled for the trial of the said Isaac Bell Cornwall. First count—For that he, the said Isaac Bell

Cornwall, on the fourth day of June, in the year A.D., 1872, at the city of London, in the said county, did feloniously, and without lawful authority, forcibly seize and confine one *James Rufus Bratton* within Canada, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown and Dignity. 2nd Count—And for that he, the said Isaac Bell Cornwall, afterwards, to wit, on the day and year last aforesaid, at the city and county aforesaid, without lawful authority, did feloniously kidnap one *James Rufus Bratton*, with intent to cause the said *James Rufus Bratton* to be unlawfully transported out of Canada against his will, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown and Dignity.

(Signed) CHARLES HUTCHINSON,
County Crown Attorney, County of Middlesex.

Isaac Bell Cornwall within named, upon the within charge being read to him by the judge in open Court, and being informed by the Judge that he has his option, either of being forthwith tried without the intervention of a jury upon the said charge or of remaining untried until the next Court of Oyer and Terminer of this county, consents to be now tried upon the said charge by the said Judge without a jury, and the prisoner pleads not guilty to the said charge."

Upon the accusation was endorsed the following order :

"Order Amending Accusation.

"COUNTY JUDGE'S CRIMINAL COURT, COUNTY OF MIDDLESEX.

The Queen v. Cornwall.

It is ordered that the accusation be amended by the inserting the name James before the names Rufus Bratton.

By the Court,
(Signed) CHARLES HUTCHINSON,
Clerk of the Peace."

D.

SHERIFF'S NOTICE.

*To His Honor the County Judge of the
County of Middlesex :*

Pursuant to the second section of the Act for the more speedy trial in certain cases of persons charged with

felonies and misdemeanors in the Provinces of Ontario and Quebec.

I, William Glass, Sheriff of the said county, certify, that the several persons whose names are mentioned in the first column of the schedule hereunder written, were committed for trial to the common jail of the said county, and were received by the jailor of the said jail, on the days severally mentioned in the second column of the said schedule opposite the names of the said persons, respectively; and were so committed to the said jail, and were received each severally, under and by virtue of a warrant from L. Lawrason, P. M., on a charge of being guilty of an offence which may be tried at a General Sessions of the Peace; and that the nature of the charge against the said several persons, respectively, as contained in the warrant of commitment, is set forth in the third column of the said schedule, opposite the names of the said several persons respectively.

SCHEDULE ABOVE REFERRED TO.

Name of Prisoner.	Time when Committed for Trial.	Nature of Charges, as contained in the Warrant of Commitment.
Isaac Bell Cornwall. London, 15th June, 1872.	15th June, 1872,	For that he did unlawfully and forcibly kidnap and take one Rufus Bratton without authority, with intent to transport him out of Canada against his will.

(Signed) WM. GLASS.
Sheriff of the County of Middlesex.

SESSIONS RECORD.

E.

“In the Court of the General Sessions of the Peace for the County of Middlesex.

County of Middlesex,) Be it remembered, that on the fifth
To Wit:) day of August, in the year of our
 Lord one thousand eight hundred and seventy-two, was
 filed among the records of this Honourable Court, and
 made of record of such Court, in pursuance of the Act for
 the more speedy trial in certain cases of persons charged
 with felonies and misdemeanors in the Provinces of Ontario
 and Quebec, a record of the conviction of Isaac Bell Corn-

wall, made by William Elliot, Esquire, Judge of the County Court of the County of Middlesex, in the following words:—

Then followed the County Judge's record as above set out in Schedule B, and concluding:

“ By the Court.

(Signed,)

CHARLES HUTCHINSON,
Clerk of the Peace.”

By a rule of Court, granted this term, the appearance of the prisoner in person was dispensed with, and he was allowed him to be represented by counsel.

William Henry Bartram, then on behalf of the plaintiff in error craved leave to assign error, which was granted.

The assignment of errors was in effect as follows:

1. There is manifest error in this, that it appears by the record and proceedings aforesaid, that the said Isaac Bell Cornwall was tried and convicted of offences other than that on which he was committed for trial, whereas his honour, the said Judge, had by law jurisdiction to try him only for the offence for which he was committed. Therefore in that there is manifest error.

2. That by the said record and proceedings, it appears that upon the day appointed for the trial the said Isaac Bell Cornwall was ready, and that the trial was postponed on application of counsel for the Crown, whereas the trial should by law have been proceeded with on the day appointed, and the said Judge had by law no jurisdiction to postpone the trial, or afterwards proceed therewith. Therefore in that there is manifest error.

3. That it appears from the record and proceedings aforesaid, and the matters therein contained, that the accusation against the said Isaac Bell Cornwall is not sufficient in law to warrant the judgment now given against him, or convict him of the felonies aforesaid, or any other offences. Therefore in that there is manifest error.

4. That by the said record and proceedings, it appears that the judgment upon the accusation aforesaid was given against the said Isaac Bell Cornwall, whereas judgment by law ought to have been given for the said Isaac Bell

Cornwall, that he be therefor acquitted, and go therefrom without delay. Therefore in that there is manifest error.

And the said Isaac Bell Cornwall prays that the judgment aforesaid, for the errors being in the record and proceedings aforesaid, may be reversed and annulled, and absolutely be had for nothing, and that he may be restored to the laws of the Province of Ontario, and to all things which he hath lost on the present occasion, or that such other or further judgment be given as the plaintiff is entitled to.

The plaintiff in error also gave notice that he would insist that the judgment was erroneous, on account of each and all of the errors specially assigned, and in particular—

1. That the jurisdiction created by 32-33 Vic. cap. 35, D. is not shown.

2. That the notice from the Sheriff shows the offence for which the plaintiff was committed to be only similar to the offence described in the second count of the accusation, before being amended, and does not refer to the offence described in the first count.

3. That a variance appearing at the trial, the Judge had no power to make the order amending the said accusation, but should have acquitted and discharged the plaintiff.

4. That at the time appointed for the trial, according to the Statute, the plaintiff was ready, but the trial was postponed without power therefor, when the plaintiff should have been discharged.

5. That the offence described in the first count of the said accusation is no legal offence.

6. That there being at least one bad count in the said accusation, there is a general judgment on both.

7. And that the said accusation is bad for duplicity, the said two counts referring to but one offence.

The Attorney General joined in error, as follows :

“ Michaelmas Term, Tuesday, 26th day of November, in A.D., 1872, and the Honourable Oliver Mowat, Attorney General of Our Sovereign Lady the Queen for Ontario, being present here in Court, and having heard the matters aforesaid above assigned for error, for our said Lady the

Queen, saith that neither in the record and proceedings, nor in the rendering of the judgment aforesaid, is there any error. Therefore the said Attorney General, &c., prayeth that the Court of our Sovereign Lady the Queen now here may proceed to examine as well the record and proceedings aforesaid, and the judgment therein given as aforesaid, as the matters above assigned and alleged for error, and that the judgment may be in all things affirmed.

Bartram for the plaintiff in error. The trial was had under the Statute of Canada 32-33 Vic. ch. 35. The prisoner was tried on a proceeding containing two counts, and by sec. 2 of the Act only one charge is to be tried. The Judge, too, could try only on the charge on which the prisoner was committed. On the construction of statutes, see *Dwarris* on Statutes, 2nd Ed., 477, 563; *Looker v. Halcomb et al.*, 4 Bing. 183.

The accusation included two charges, contained in different counts, while the Sheriff's certificate stated only one charge, which was the charge contained in only one of the counts. As County Court Judge, the presiding Judge had no power to try except on the charge on which the person was committed. [RICHARDS, C. J.—Suppose the second charge includes the first?] The law must be construed strictly. The Sheriff's notice is in the nature of an indictment.

The Judge could not make the amendment he did against the prisoner: *Regina v. Whelan*, 28 U. C. R. 94; *Arch. Crim. Plg.*, 17th Ed., 208; 1 *Ch. Cr. Law*, 216, 293; *Regina v. Quinn*, 29 U. C. R. 158.

The Judge had no power to adjourn as he did from the 3rd to the 15th of July. The 4th section of the Statute requires that an early day shall be fixed for the trial, and the prisoner being ready, the Judge shall proceed to try him. See also *Consol. Stat. U. C. ch. 114*.

The charge was made under the Canada Act 32-33 Vic. ch. 20, sec. 69, which requires the *intent* with which the act was committed to be stated, and no such intent is stated in the first count, and such intent must be alleged

and proved : *The King v. Phillips*, 6 East 464. One of the counts being bad, and there being a general judgment, the judgment must be reversed : *O'Connell v. The Queen*, 11 Cl. & Fin., 155

The last ground of error was abandoned.

This Court on a reversal may proceed to pronounce the proper judgment : Consol. Stat. U. C. ch. 113, sec. 17.

J. G. Scott, for the Crown. It is not admitted that there are two counts as stated. So far as is shown, the prisoner was tried upon the charge upon which he was convicted, but if otherwise, the insertion of a second bad count would not, according to the usual practice, make the indictment bad. *Com. Dig.* "Courts" B.

The Criminal Procedure Act of 1869, 32-33 Vic. ch. 29, gives a *General Form* of indictment under sec. 27 of the Act, which is sufficient to sustain this conviction, and ch. 35 gives also a form of record suitable to this kind of trial. By sec. 79 of the same Act, no writ of error can be supported if the record describe the offence in the words of the statute creating the offence, although they be disjunctively stated, or appear to include more than one offence or otherwise. That section does not, in words, apply to trials before a judge; but sec. 70 shows the Act applies to "any Court of Criminal Jurisdiction in Canada." And by sec. 32 no objection shall be taken after plea pleaded to any indictment for any defect apparent on the face thereof; *Reg. v. Mason*, 22 C. P. 246.

As to adjournments, the 32-33 Vic. ch. 35, sec. 7, shows the Judge may, if the witnesses do not attend, cause them to be arrested, which implies the postponement of the trial : *The King v. The Justices of Wilt*, 13 East 352; *Keen v. The Queen*, 10 Q. B. 928; *Com. Dig.* "Courts," P. 4, 11. As to the effect of a judgment when there are several counts, and an offence or felony alone found : see *The King v. Salomons*, 1 T. R. 249; *Campbell v. The Queen*, 11 Q. B. 799; *Holloway v. The Queen*, 17 Q. B. 317; *The King v. Powell*, 2 B. & Ad. 75; *The King v. Redman et al.*, 1 Leach C. C. 477; *The King v. Morris*, 1 Leach C. C. Consol. 109, Stat. U. C. ch. 113, sec. 17.

WILSON, J., delivered the judgment of the Court.

The prisoner was committed to gaol for trial, on a charge of "unlawfully and forcibly kidnapping and taking one Bratton, without authority, with intent to transport him out of Canada against his will," which is said to have been the language of the warrant of commitment.

That offence is made a felony by the Act of 1869, ch. 20, sec. 69.

As the Sessions of the Peace have under their jurisdiction the power to try "all felonies and trespasses whatsoever," 4 *Bl. Com. Kerr's* 3rd ed. 312; and as this offence is plainly a trespass, accompanied with a breach of the peace, it is within the cognizance of the Sessions: *Regina v. Yarrington*, 1 Salk. 406. A felony, created since the passing of the Statute 34 Edw. III., ch. 1, which created Courts of Quarter Sessions, is within the jurisdiction of the Sessions: *Crampton's Justice*, p. 8. But not an offence less than felony, and not being a breach of the peace, unless expressly empowered to try it: *The King and Queen v. Buggs*, 4 Mod. 379.

The Courts of Quarter Sessions have power to try also all misdemeanours which are a breach of the peace, or have a tendency to provoke a breach of the peace; but not cases of perjury or forgery: *Ex parte Bartlett*, 7 Jur. 649.

The jurisdiction of our Courts of General Sessions of the Peace is not expressly defined in our Statute: Consol. Stat. U. C. ch. 17.

By sec. 8, such Courts need not deliver the gaol of persons confined on charges of simple larceny, but may leave them to be tried at the next Court of Oyer and Terminer and General Gaol Delivery, if by reason of the difficulty or importance of the case, or for any other cause, it appears to the Court proper to do so.

By the Act of 1869, ch. 20, sec. 48, the Sessions are prohibited from trying the offences under the 27th, 28th, and 29th sections of that Act. And by ch. 29 of the same year, sec. 12, the Sessions have not the power to try any treason, or any felony punishable with death, or any libel.

There is no doubt then the Sessions had jurisdiction over this offence, and so the Judge of the County Court had the power to try it.

Kidnapping is an offence at the Common Law: 4 *Bl. Com. Kerr* 3rd ed. 243; *Designy's case*, Sir T. Ray 474; S. C. 2 Shower 218. It does not necessarily mean, as stated in *Bl. Com., supra*, sending or taking the person stolen out of the country: *Lord Grey's case*, 2 Shower 222; *Calthrop v. Axtel*, 3 Mod. 169.

The prosecutions referred to were by information for the offence; but the re-delivery of the person taken was effected by the writ *de homine replegiando*.

The warrant of commitment sufficiently stated an offence against the Act of 1869, ch. 20, sec. 69, which enacts that "Whosoever, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person, with intent:

1. "To cause such other person to be secretly confined or imprisoned in Canada against his will; or,

2. "To cause such other person to be unlawfully sent or transported out of Canada against his will; or,

3. "To cause such other person to be sold or captured as a slave, or in any way held to service against his will, is guilty of felony," &c.

The prisoner being in gaol under the charge in the warrant contained, the sheriff notified the Judge in writing that the prisoner was confined, and stated his name "and the nature of the charge preferred against him." And the Judge caused the prisoner to be brought before him. Then having (as the statute says, and as we must assume was the fact,) obtained "*the depositions* on which the prisoner was committed," he stated to the prisoner that he was charged as in the record stated; namely, "that he feloniously, and without lawful authority, forcibly seized and confined one J. R. Bratton within Canada, and that he afterwards, without lawful authority, feloniously kidnapped one J. R. Bratton, with intent to cause him to be unlawfully transported out of Canada against his will.

Then the Judge, having given the prisoner his option to be tried forthwith before the Judge without a jury, or to remain untried until the next sittings of the proper Court, and the prisoner having consented to be tried by the Judge without a jury, a record was prepared, called in one of the documents sent here an *accusation*, and set out in Schedule C, which contains a statement of the proceedings down to the plea of the prisoner. That is the proceeding which the Statute calls a *record*. On not guilty being pleaded, the plea is to be entered on the record. And the later proceedings should also be continued *in it*, according to Schedule A of the Statute.

There can be no objection to the Clerk of the Peace or County Attorney drawing an indictment, as it were, or accusation or record, for the proceeding is a record for the purposes of the trial, and afterwards drawing a judgment roll, as it were, containing a record of the whole proceedings, although it does not seem to be necessary to have more than the one record, in which shall be entered the proceedings from time to time taken, until the final determination of the matter.

This "*record*," as the Statute calls it, contains the charge as before stated, and in it the charge consists of two parts or counts.

The prisoner contends there are two charges made against him, and to which he pleaded, while he was committed to gaol for trial on only one of these charges, and because he was so committed, and has been tried for more than he was committed upon, the whole proceeding is void.

The Statute, as before mentioned, makes it a felony, among other things, without lawful authority forcibly to seize and confine or imprison any person within Canada, &c., or "without lawful authority to kidnap any other person, with intent to cause him to be unlawfully transported out of Canada against his will."

These are separate offences. The prisoner was committed, so far as the warrant shows, upon the last of them only.

The prisoner may have been committed only on the

charge in the second count contained. The charge on which he was committed was one triable by the Sessions. That being so, the Judge, with the prisoner's consent, had the power to try him without a jury.

The Statute does not say, the Judge shall try him on the charge for which he is committed; but, the prisoner being in gaol for trial for an offence for which he might be tried at the Sessions, the Judge shall, with the prisoner's consent, *try him* out of Sessions.

The Sheriff is not to notify the Judge of the charge, but of the "nature of the charge."

The Judge is not to call for the warrant of commitment, to find out what offence the prisoner is charged with; but he is to obtain "the depositions on which the prisoner was committed," and he is to state to the prisoner the offence with which he is there charged.

The depositions or warrant do seldom describe the offence fully, or with such accuracy as it must be stated in the indictment. The warrant says nothing of the kidnapping having been *feloniously* done. But it was absolutely necessary the record should do so.

The purpose of the Statute was not to compel the Judge to try the prisoner upon any charge he was confined upon in the language of that charge; but, to try him on that charge, in any form in which the charge could properly be laid against him.

The provisions, before referred to, shew that, and also the very first words of the Act itself, "Any person committed to a jail for trial on a charge of being guilty of *any offence* for which he may be tried at a Court of General Sessions," &c.

It was never intended that the prisoner, if he were committed on a charge of larceny, should be tried for manslaughter by the Judge; nor, if he were in for an assault, that he should be tried for larceny; nor if he were in for arson, that he should be tried for burglary.

But on the other hand, it was never intended that if the prisoner were committed for trial for stealing the goods of

A, that the same goods should not be described in another count, if it were necessary to do so, as the goods of B ; nor, if he were in on a charge of larceny, that he should not also be tried for feloniously receiving the same goods ; nor if he were in on a charge for unlawfully and maliciously wounding with intent to maim, that he should not be tried on another count for the same wounding, with intent to do some grievous bodily harm.

So we also think, in those cases in which a jury could acquit of the felony and convict of a misdemeanour, or of an assault, or could acquit of the offence charged if it were not completed, and convict the prisoner of the attempt to commit it, the Judge might, under the Statute, do the same.

That which the Court could do, the Judge is to do, if the prisoner elect to be tried by the Judge. It is a mere change of tribunal,—a Judge without a jury, in place of a Court with a jury—a trial forthwith, instead of remaining untried until the meeting of the Court.

It cannot be said here, even if the Judge is to be confined to the charges in the depositions contained, that he has exceeded his duty in any respect. We have not seen the depositions, and they are not before us in fact, even if we could look at them if they were here.

We think that after the prisoner has heard the charge read to him, and has elected to have it tried by the Judge, and has pleaded to it, and has been tried, that he cannot object to the record which has been made up against him because it describes or lays the charge in different forms to meet the facts of the case, so long as it does not contain different distinct offences.

* If it were otherwise, the prisoner and not the Crown would be the *dominus litis*. Suppose, as in the case of *Re Thompson*, 6 H. & N. 193, the information and the depositions shewed facts which would sustain an indictment for a rape, and the magistrate committed the party for “unlawfully assaulting and abusing” the woman, can the prisoner insist on being tried for the assault ; or might not the

Judge decline to try the case at all, because the higher offence might be proceeded for, and he had no jurisdiction to try it; or, if he had the jurisdiction, would he be bound to do what the prisoner required him to do, to try the assault only? I think, if the Judge had the jurisdiction over the charge, he could try it in such manner and form as it should be properly laid and tried.

The case *The Queen v. Elrington*, 1 B. & S. 688, shews that an assault and battery, accompanied by malicious cutting and wounding so as to cause grievous bodily harm, cannot be prosecuted after an information has been laid for an assault and battery, and the Justices have dismissed the complaint, and given a certificate of dismissal, and it shews how careful the Judge should be in having the charge or offence laid in its proper and full form.

But the argument of the prisoner here is, that the Judge shall and must try him for the common assault, and for nothing else, and that neither he, nor the Crown officer, has any discretion as to the mode of laying the offence. That we do not agree to. We hold the record was properly framed, in stating the offence charged in such form as the depositions or evidence shewed that it should have been laid. It was the same offence, but described differently. It was the offence of unlawfully seizing and confining another, or of kidnapping another with intent; just as if the two counts had stated a kidnapping with any two of the intents mentioned in the statute.

It was next objected, that the Judge had no power, on the application of counsel for the Crown, on the day appointed for trial, to postpone the trial.

The record shews, that on the day appointed by the Judge for trial, which was the third of July, the prisoner, being again brought before the Judge, declared himself ready for trial, and on the application of counsel for the Crown, the trial was then postponed until the fifteenth of July, when the trial took place.

The statute requires that the Judge shall appoint an early day, or the same day, for the trial. "That is for the

benefit of the prisoner. But the Judge must consider also the prosecutor or the Crown officer, and the witnesses for the prosecution, as well as the prisoner and his witnesses. The Judge could not, with propriety, appoint the *same day* on which the prisoner elected to be tried, if the prosecutor and his witnesses were at their homes, perhaps many miles away, or it may be, absent at the time from the country.

The *early day* he is to appoint, is that which on a consideration of all the facts—of the prosecutor and of the witnesses for both sides being ready, and of the ability of the County Attorney and of the Judge himself to be present at the time named or suggested—he may name. Nothing is said of an adjournment after the day has been fixed for trial, but the seventh section implies that there may be such an adjournment, for upon proof of the service of subpoena upon him, if “any witness fails to attend before him, as required by the subpoena, and the Judge being satisfied that the presence of such witness before him is indispensable to the ends of justice, he may, by his warrant, cause the witness to be apprehended.”

So the prisoner or the Judge, or some of those concerned in the investigation, might happen to be taken unwell; or there might be other cases of the like kind for trial before the Judge fixed for the same day, which might necessitate an adjournment; or the Judge or some of the parties might require to attend at some other Court to give evidence; or there may be or may have been many other causes which would require an adjournment to be made; and it must be that for just cause an adjournment may be granted.

If the prisoner asked for it, he would certainly be entitled to it; or if he assented to it, and we think it may be presumed he did assent in fact, or by not objecting, if that would make any difference, when the adjournment was asked for, and was granted in his presence. It is not to be assumed, because the adjournment was asked for by the Crown officer, that he did so for the purpose of wrong-

fully preventing a speedy trial, or of keeping wantonly the prisoner a longer time in confinement.

The objection is taken in its most rigid form, that the Judge had not the power in law for any cause to grant an adjournment; or rather, I should say, to postpone the day of trial.

. In *Rex v. Stone*, 6 T. R. 530, an adjournment was granted in the course of the trial, which had lasted from nine in the morning till ten at night, without any interruption or refreshment, and the Attorney General stating his evidence would occupy four hours more, and some of the jury being very much exhausted and incapable as they declared, of keeping up their attention much longer, until nine the next morning. Lord Kenyon, C. J., observing that necessity compelled what it justified; that no rule could compel the Court to continue longer sitting than their natural powers would enable them to do the business of it. The adjournment and the cause of it were stated on the record. The adjournment is made without the consent of the prisoner by the authority of the Court: *Ib.* note (a).

In 2 *Hale's* P. C. 24, it is said, it is not necessary or usual to enter adjournments, for the session of the Court always relates to the first day; though, if a felony be committed after the first day, an adjournment from the first day should be made, so that it may appear the Court had jurisdiction at the time of the felony committed: 2 *Hale's* P. C. 156, 261.

A prisoner's trial may be adjourned if the case has only been opened by counsel for the prosecution, but not after evidence called: *Regina v. Robson*, 4 F. & F. 360. See also, *The Queen v. Wenborn*, 6 Jur. 267.

The Sessions of the Peace may adjourn, or respite a judgment from one Sessions to another without adjourning the Sessions, and they are not compelled to adjourn to a later day in the same Sessions. Coleridge, J., asked, could not the Sessions put off a trial on account of the absence of witnesses until a subsequent Sessions? *Rex v. The Inhabitants of Kimbolton*, 6 A. & E. 603. See also *Rex v. The Justices of Wilts*, 13 East 352, 354.

In *Keen v. Reginam*, 11 Jur. 1060, it was said the Sessions of the Peace have an inherent right to adjourn, if it be necessary for the advancement of justice or convenience, and the Sessions are to judge of the proper occasion for doing so.

And it was said in *Winsor v. The Queen*, L. R. 1 Q. B. 289, 306, as to the power of the Judge to discharge a jury in a criminal or in a capital case, when they could not agree, "That so far from the practice of thus discharging a jury being a mischievous one, it is one essential to the upholding of the pure, conscientious, and honest discharge of the duties of a jurymen." And it was said, that the doing so was "a matter of practice," *Ib.* p. 303; a matter for and in the discretion of the Judge. The cause of the discharge was stated on the record, and the cause being sufficient in law, the Court said they could not review it; that the *necessity* there stated for the discharge of the jury was a matter of fact and not of law, a conclusion to be drawn from all the circumstances of the case: *Ib.* p. 309.

But if the Judge wrongly made the adjournment, it is clear the prisoner is not to be discharged. If there had been a jury, a *venire de novo* would have been awarded: Per *Blackburn, J.*, *Ib.* p. 319, in Exch. Ch. 395.

To what effect could anything like a similar process issue here, where there has been no jury, and where the same Judge has acted? At most, he could only have gone over the whole trial again as far as he had proceeded at the time of the adjournment, just as he would have done if there had been a jury, and one of them had died or been taken unwell, so that the first jury was discharged and another jury were empanelled: *The King v. Edwards*, 4 Taunt. 309. But why go over the case again on the day to which it was postponed? Who was there to hear any part of it who had not before heard it?

We are of opinion the Judge had the right and power to make the adjournment on the prayer of the counsel for the Crown, and that the record is not objectionable because the cause of the adjournment is not mentioned. It must

be assumed it was for just cause, and there was no inconvenience in it, as there was not a jury. It was done, too, in the prisoner's presence, and no objection was made to it.

The next objection taken is, that the accusation is not sufficient in law. I understand by that, that it is contended that the first count is insufficient in law because it is laid without any intent.

As I read the statute, it is an offence "without lawful authority, forcibly to seize and confine, or imprison any other person within Canada," without laying any intent. And it is an offence to "kidnap any other person with intent," &c. Both counts being valid in my opinion, and the prisoner being found guilty on both of them, the finding is sufficient.

The first count, of course, stated the charge to have been *feloniously* committed; and a *felonious* seizing and confining is, I think, a complete offence in itself, without any intent assigned. The intent, I think, applies to the kidnapping only. A felonious seizing and confining in Canada, may not be accompanied with a secret imprisonment; and it is, I think, as much an offence as when there is a secret imprisonment.

If the first count be bad, the judgment would have to be reversed *in toto*, by the general law: *O'Connell v. The Queen*, 11 Cl. & F. 155, S. C. 9 Jur. 25; *Campbell v. The Queen*, 11 Q. B. 799.

But if there be one good count, and the other bad, we are not to reverse judgment only, for, by the Consol. Stat. U. C. ch. 113, sec. 17, we "may either pronounce the proper judgment or remit the record to the Court below, in order that such Court may pronounce the proper judgment." See *Holloway v. The Queen*, 17 Q. B. 317. I think this objection fails.

It was next objected that the Judge had no power to amend the name of Rufus Bratton, by adding the name *James*, as the first of his names. It does not appear whether the amendment was made before or after plea pleaded. The Judge is, by ch. 35, sec. 4, a Court of Record.

He does not come within Consol. Stat. U. C. ch. 111. The order for amendment is endorsed on the record, according to ch. 29, sec. 73. Such a matter is clearly within the provisions of 32-33 Vic. ch. 29, sec. 71, if this proceeding before the Judge is within it. That section enacts, that "whenever on the trial of an *indictment*," &c.

An "indictment" is "a written accusation of one or more persons of a crime or misdemeanor preferred to and presented on oath by a grand jury": 4 *Bl. Com. Kerr.* 3rd ed. 352; *Arch. Crim. Plg.* 17th ed. 1; 1 *Chitty Cr. Law*, 162, 168. The record on which this prisoner was tried does not come within that definition. But it is within the signification assigned to it by the Act of 1869, ch. 29, sec. 1, which applies to every "information, inquisition, and presentment, as well as indictment, and also any plea, replication, or other pleading, and any record." If this record were not within the Act, and if the name were for variance held to avoid the finding of the Judge, the prisoner would not be discharged; but while freed from this conviction, he would be liable to be tried over again on an amended proceeding before the Judge, if he elected, or upon an indictment found by a grand jury.

We should not assume this amendment to have been made before plea, to bring about such a result: *Rex v. Powell*, 2 East P. C. 976; *Rex v. Hart*, *Ib.* 977.

The objection to the amendment of an indictment was, that it was the finding of the grand jury upon their oath, and it could not be amended without their concurrence. But a criminal information, and this record is in the nature of it, which is not found upon oath, was held to be amendable at any time before trial: *Rex v. Wilkes*, 4 Burr. 2527, 2568, 2569; *Rex v. Holland*, 4 T. R. 457.

In *Mellish v. Richardson*, 9 Bing. 125, in H. L., it was decided that it was not competent to a Court of Error to revise amendments in the record made by a Court of Record, although the order for the amendment were sent up as part of the record. For these reasons this objection cannot be sustained.

It is also said by the prisoner, that the record is bad, for the two counts refer to but one offence. But the Court will not presume that to be the case: *Holloway v. The Queen*, 17 Q. B. 317.

If it were so, it seems duplicity would not be a ground of error: *Nash v. Regina*, 10 Jur. N. S. 819; or, if it were, we do not see why judgment should not be given on one of the counts, under the Consol. Stat. U. C. ch. 113, sec. 17, before referred to.

It was also objected that the jurisdiction conferred by the Speedy Trial Act was not shown. The answer to that is, that the record and judgment are in the very form enacted by the statute to be followed.

And, lastly, it was objected that the notice from the Sheriff to the Judge described only the offence in the second count mentioned, which objection we have answered already.

We all agree that the judgment must be for the Crown on all points, excepting on the objection to the invalidity of the first count in omitting the intent, which the learned Chief Justice and my brother Morrison think must be alleged for the offence in the first count, as well as for the offence of kidnapping stated in the second count.

The judgment must therefore be reversed. And as we cannot pronounce judgment, because the punishment is discretionary, and we have no knowledge of the facts, we must remit the record to the Judge who tried the prisoner and gave judgment, in order that he may pronounce the proper judgment upon the record against the prisoner.

And for this purpose we order that a writ of *habeas corpus* do issue to the Warden of the Penitentiary, to deliver the body of the prisoner to the Sheriff of the County of Middlesex, and a writ of *habeas corpus* to the Sheriff of the County of Middlesex to receive the body of the prisoner from the said Warden, and the prisoner safely to convey to the common gaol of the said County of Middlesex, and him cause to be detained therein under safe custody to and until William Elliot, Esquire, Judge of the County Court

of the said County, and authorized to act as Chairman of the General Sessions of the Peace in and for the said County, by and before whom the said prisoner was tried and sentenced, shall pronounce the proper judgment on the record, which record we direct to be remitted to him for that purpose, according to the Statute in that behalf.

The Judge will, of course, pronounce his judgment only upon the second and valid count or charge contained in the said record, the effect of which will be the same as if it had been originally pronounced upon that count alone.

Judgment reversed.

GILLSON V. THE NORTH GREY RAILWAY CO.

*Setting out fire—Liability of Railway Co. for negligence of subcontractor—
Interference of the Company's engineer.*

The plaintiff owned land in Nottawasaga, through which the defendants constructed their railway. Portions of the work of construction, including the cutting, grubbing and clearing of the track of trees, &c., to be done to the satisfaction of the defendant's engineer, were let to M. & G., who sub-let it to other parties. The engineer, who had power to urge on the work, but no control over the men, directed the workmen, servants of the sub-contractor, to hurry on, and told them to burn the brush and timber in the centre of the track, not on either side. The fire was lit in July, and spread into the plaintiff's land. In October, the fire having smoldered meanwhile, as the plaintiff alleged, broke out afresh, and did the greater part of the damage.

Held, that the contractors, not the defendants, were *primâ facie* responsible for the injury, if caused by negligence on the part of those who set out the fire; and that the evidence, more fully set out below, did not show such an interference by the engineer as would make the defendants liable.

Held, also, following *Dean v. McCarthy*, 2 U. C. R. 448, that a proprietor setting out fire on his own land in order to clear it, is not an insurer that no injury shall happen to his neighbor, but is responsible only for negligence: *Fletcher v. Rylands et al.*, L. R. 3 H. L. 330, commented upon.

Held also, that if the action could be maintained, only the damages awarded for the first fire in July should be recovered, as the weight of evidence showed that the second fire arose from other causes than the first fire.

DECLARATION.—The first count alleged that the plaintiff was possessed of certain lots of land in the township of Nottawasaga, closely adjoining certain other lots in the

possession and occupation of the defendants, and the plaintiff had thereon a large quantity of trees and standing timber growing and being, and also a large quantity of cordwood and railroad ties lying and being on the said lots; and the defendants wrongfully lighted a fire in the open air on their said close, closely adjoining the lots of the plaintiff, at a time when, by reason of the state of the wind and weather, it was highly dangerous to light a fire; and through the negligence and carelessness of the defendants, in that behalf, the fire extended from defendants' close to the lots of the plaintiff, and upon the trees, standing timber, cordwood, railroad ties, and fences thereon growing and being, and the same thereby took fire and were consumed.

The second count was for wrongfully permitting a fire to remain on defendants' land near to the plaintiff's close, in a careless, negligent, and improper manner, and at a time when by reason of the state of the wind and weather it was dangerous to do so, so that by and through the negligence and carelessness of the defendants, and for want of due and proper care and caution on their part, the fire extended itself from defendants' land into the plaintiff's close, and to the trees, standing timber, cordwood, railroad ties, and fences thereon being, igniting, burning, and destroying the same.

3rd count.—Trespass *quare clausum fregit*, into lots 48, 49, and 50, in the 12th concession of Nottawasaga, cutting down and destroying trees, underwood, fences, and cordwood thereon.

4th count.—Trover for pine logs, cedar logs, hemlock logs, cordwood, and railroad ties.

The plaintiff originally, by his declaration, claimed \$4,000, but by leave of the Judge at the trial the declaration was amended so as to make the damages claimed \$7,000.

Defendants pleaded "Not guilty," by Statute, Consol. Stat. C. ch. 66, sec. 83, and 34 Vic., ch. 36, sec. 2 & 3, O.

The cause was tried at the last Spring Assizes, at Barrie, before Galt, J., when a verdict was rendered for the plaintiff for \$2,250 damages.

From the evidence given at the trial, it appeared that the plaintiff was the owner of land through which the defendants' railway passed: that the latter had let certain works connected with the construction of the railway to Messrs. Manling & Ginty, which works included, amongst others, the cutting down of the timber, grubbing and clearing the track of the railway, and making fences along the line of the road.

The work was to be proceeded with and completed in sections, according to the terms mentioned in the contract, and to the satisfaction of defendants' engineer, who had power, in case the work was not being completed by the time mentioned in the contract, to employ from time to time more men, if the contractors did not increase the force at work on the line of the railway; and the work was to be done and materials found to the satisfaction of the engineer in charge.

The cutting, grubbing, and clearing of the track and the fencing, was sub-let by Messrs. Manning & Ginty to other parties, by whom the work was done. During the progress of the work one of these sub-contractors had, in cutting down the trees, so arranged matters that the body of the trees could be cut into cordwood, and the tops and limbs were placed on either side of the railway track, and the sub-contractor intended to burn it in the fall. The engineer in charge of that portion of the work directed him not to pursue that course, as the burning of the brush on either side of the road would be more likely to cause the fire to spread and injure the land of the adjoining proprietors. He directed him to bring the whole of the timber and brush to the centre of the defendants' track and burn it there, so as not to injure the adjoining proprietors in doing the work. The timber was thrown into a line in the centre of the track and set on fire in the month of July. The sub-contractor, in his evidence said,

he set fire on the first of July, and that defendant's engineer told him to do so.

The fire burned the timber in the railroad track, and, as the weather got warmer, it spread a little into the plaintiff's land. This fire was never altogether put out, according to the testimony of some of the witnesses. In the latter part of September, or beginning of October, the fire which caused the greatest injury took place. The plaintiff and some of his witnesses stated, that the fire smouldered in his land from July to October, and when a strong wind arose in October it started it afresh, and did the greatest amount of damage. The person who started the fire in July, said when he was told to set the fire in July, he thought it was dangerous to do so, the weather was so very dry, and there had been no rain of any account since the early part of June. He tried to put the fire out, but it was impossible to do so, owing to the nature of the timber and the soil.

It appeared that there was quite a heavy fall of rain between the two fires, the latter and more serious one occurring in October. The rain filled the ditches at the side of the railway.

The defendants called the engineer of the Company in charge of this portion of the work, who stated that he had told the contractor to burn the brush and wood in the centre of the road, and not on the sides, because he would endanger the neighbouring property by burning it on the sides. He said he had no control over the men; he had only to do with the contractors. When he found the sub-contractor burning on the sides, he told him to burn in the middle. He had no recollection of telling the sub-contractor (Winters) to burn the whole stuff in the middle of the track. When he saw any work lagging he generally spoke to the sub-contractor, or to Mr. Manning's agent. He had no doubt he told them to hurry on. It was no part of his duty to direct the men to put in the fire. He would caution them. He did not tell them when to put in the fire, or when not to put it in. It took about a month to

burn the timber on the track through plaintiff's property, viz, from 15th July to 15th August.

Parties who passed over the plaintiff's land in September, before the last fire, and before a very heavy rain in that month, saw no fire on the place then.

Mr. *Manning*, the contractor, in his evidence said, amongst other things, that the season was so dry it was dangerous to put a fire anywhere. The railway could not have been built without burning off the timber. It was always dangerous to burn off timber along the railway. He said he found fault with the sub-contractor for not pushing the work. He cautioned him to be careful about fire, because he, the sub-contractor, would be responsible to him, Manning, for damages under his contract. Mr. McDougall, defendants' engineer, had no control over any of his sub-contractors, as to where they were setting out fire, he had only control if the work was not being done according to contract.

At the end of the plaintiff's case, the defendants' counsel objected, that defendants were not liable, on the grounds :

1. The damages, if any, having been done by a sub-contractor, neither contractor nor sub-contractor being a servant of the Company, the defendants were not liable for their negligence.

2. The instructions of Mr. McDougall could not make the Company liable. He had no authority over the contractor as to the time when the fire should be set. His business was to see that the work was done according to the contract, but not to direct the time or manner.

3. There was no evidence of negligence in setting the fire. The dry time appears to have been in October, after all the work had been done, and the fire appears to have arisen from smouldering fires; and not to have followed upon setting the fires.

The last (3rd) objection was overruled, and leave was reserved to defendants to move to enter a nonsuit on the first two grounds.

The learned Judge left it to the jury to consider, 1st.

Did the fires in August and the fires in October arise from the acts of persons engaged in constructing the railway? If satisfied the fires did so originate, were they or either of them lighted negligently: *i.e.*, were they set out under such circumstances, that a prudent or careful man would not have lighted them? If satisfied the first fire was so caused, and the second was not, then they should confine their damages to what was caused by the first fire, which was comparatively small. If they found that both the fires were caused by the negligence of the parties, they should assess all the damages; and the learned Judge requested the jury, if they found for the plaintiff, to say what damage the plaintiff had received up to the 7th of August, and what damage by the fire on 10th of October. He reserved leave to defendants move to reduce the damages to the loss sustained up to 7th August, if the jury found for the plaintiff for damages by the fire in October, because he was of opinion that the damages were too remote, and he wished to reserve that question for the opinion of the Court.

The jury found for the plaintiff, damages \$2,250 : \$750 damages to the 7th August; \$1,500 damages on the 10th of October.

In Easter Term last *McMichael*, Q.C., obtained a rule *nisi*, calling upon the plaintiff to shew cause why the verdict obtained in this cause should not be set aside, and a nonsuit entered, pursuant to leave reserved; or for a new trial, on the ground that the verdict was contrary to law and evidence, there being no evidence that the fire was caused by fires on the railway; and for misdirection of the learned Judge in telling the jury that the defendants were liable if their contractors and sub-contractors were liable, and that the contractors were servants of the Company so as to make them liable for their acts; and for excessive damages; or to reduce the verdict to the sum of \$750 on leave reserved, it appearing that the October fires, for which \$1,500 were given, occurred long after the fires on the railway had been extinguished.

During this Term *McCarthy* shewed cause. At Common Law a party was always responsible for damage from fires made on his own lands, either accidentally or designedly, except by a stranger. The Statute of Anne limited the liability to cases of fires arising from negligence, but did not refer to fires lighted intentionally: *Tubervil v. Stamp*, 1 Salk. 13; S. C. L. Raym. 264; *Filliter v. Phippard*, 11 Q. B. 347; *Canterbury v. Attorney General*, 1 Phill. Chan. 306. *Dean v. McCarthy*, 2 U. C. R. 448, will be relied on by the defendants, but the decision in that case does not apply to a negligent lighting, but rather to where a *vis major* has intervened.

Defendants' engineer told the sub-contractors they must put the wood in the centre of the road, and directed when the fire must be lighted, and told them they must hurry on with the work; the fire could not be avoided, and it is no difference if there was negligence or not; *Pickard v. Smith*, 10 C. B. N. S. 470, per *Williams, J.*, *Ib.* 478, 479; *Johnston v. Hastie*, 30 U. C. R. 232; *Hole v. Sittingbourne and Sheerness Railway Co.*, 6 H. & N. 488; *Fletcher v. Rylands et al.*, L. R. 1 Ex. 265, S. C. L. R. 3 H. L. 343; *Blake v. Thirst*, 2 H. & C. 20; *Jones v. Festiniog Railway Co.*, L. R. 3 Q. B. 733; *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767. As to the reduction of damages, the evidence is clear the fire slumbered, and if so, the point is not open to argument; *Bonomi et ux. v. Backhouse*, E. B. & E. 622; *Knapp v. London, Chatham, and Dover Railway Co.*, 2 H. & C. 212.

McMichael, Q. C., contra. As to the fire in October, if it arose from the burning on defendants' railway, the plaintiff was guilty of contributory negligence, by allowing the fire to remain and smoulder on his own land. Under defendants' charter, 34 Vic. ch. 36, O., the work was to be done within two years from the passing of the defendants' act of incorporation. The act was itself legal, and therefore negligence must be shewn: *Redfield on Railways*, 4th ed., 503. Was there then any negligence in performing it? If there was, can defendants be liable for the negligence of the con-

tractor in performing it. The interference of defendants with the contractor was of a very limited character : *Ellis v. Sheffield Gas Company*, 2 E. & B. 767 ; *Woodhill v. Great Western Railway Co.*, 4 U. C. C. P. 449 ; *Hodges on Railways*, 5th ed., 449 ; *Serandat v. Saisse*, L. R. 1 P. C. 152 ; *Overton v. Freeman et al.*, 11 C. B. 867.

RICHARDS, C. J., delivered the judgment of the Court.

The general doctrine, that the master who employs and has control of the servant is the person responsible for his negligent acts and for injuries caused by such negligence or want of care and skill, and not the owner of the premises on which and for whom certain works are contracted to be done by the master of the servant, seems well established. For some time it was thought that this rule did not apply to works to be performed on the real estate of the owner, but that distinction seems now to be exploded.

The following review of the authorities on the subject, from *Bush v. Steinman*, 1 B. & P. 404, to *Gayford v. Nicholls*, 9 Ex. 702, is taken from *Shearman and Redfield on Negligence*, 2nd ed., p. 104, note 1 :

“The history of the decisions and *dicta* upon this point is worth reviewing. The distinction seems to have been first suggested by Eyre, C. J., in *Bush v. Steinman*, 1 B. & P. 404. The other Judges did not put their decision upon that ground. In *Laugher v. Pointer*, 1826, 5 B. & C. 547, the Court was equally divided upon the question whether the rule in *Bush v. Steinman* should be applied to the owner of movable property, and the Judges who held that it should not relied much upon this distinction as the proper basis for the judgment in the earlier case. In *Quarman v. Burnett*, 1840, 6 M. & W. 499, the Court decided that *Bush v. Steinman* could not be supported on any other ground, but intimated that it might well stand upon this. The same opinion was expressed in *Rapson v. Cubett*, 1842, 9 M. & W. 710. In *Milligan v. Wedge*, 1840, 12 Ad. & El. 737, the validity of this distinction was doubted ; and in *Allen v. Hayward*, 1845, 7 Q. B. 960,

it was practically denied; but it was not until 1849 that it was finally passed upon. At that time a case was argued in the Exchequer, where it appeared that the defendants contracted with A. to build a portion of its road. In building a bridge over a highway, through the negligence of A.'s workmen, B. was killed while passing underneath the bridge, by a stone falling on him. Held, that his administratrix could not recover against defendants under the statute, the accident being caused by the negligence of the contractor's workmen: *Reedie v. London and North Western Railway Co.*, 4 Ex. 244. In this case, the authority of *Bush v. Steinman* was strongly pressed, as establishing the doctrine that there was a distinction between the liability of the owner of real estate, and that of the owner of chattels, for their negligent management, by virtue of which the former is liable where the latter might not be. But the Court (per Rolfe, B.) said: 'On full consideration we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance; and in fact, that according to the modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground upon which the judgment of the Court proceeded.' In *Overton v. Freeman*, 1851, 11 C. B. 867, which was decided in the same Court which decided *Bush v. Steinman*, that case was expressly over-ruled, and *Reedie v. North Western Railway Co.* approved, if not even divested of its qualification in respect to a nuisance. In *Gayford v. Nicholls*, 1854, 9 Ex. 702, *Bush v. Steinman* was again cited and overruled; and since that time we cannot find that it has ever been quoted as an authority in England. The American cases in which it has been cited, have been reviewed in a note to sec. 79. All the recent decisions are opposed to it."

The difficulty is to determine clearly when the doctrine *facit per alium facit per se* prevails, notwithstanding the work may be done under a contract.

In *Hole v. Sittingbourne and Sheerness Railway*, 6 H.

& N. 497, Pollock, C. B., said: "Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized the act—the remedy is against the person who did it. * * There is a distinction between mischief which is collateral and that which directly results from the act which the contractor agreed and was authorized to do." Wilde, Baron, in the same case said, there was some little difficulty in formulating the principle in words. He stated the distinction to be, "When the work is being done under a contract, if an accident happens and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act and is responsible for it."

The above case, in which the exception arose, was where the defendants were, for their own purposes, allowed to construct a bridge across a navigable stream; but they were only to keep it closed for limited periods. The contractor employed by them constructed the bridge so imperfectly that it would not swing. Defendants were held liable.

In *Gray et ux v. Pullen et al.*, in the Exchequer Chamber, 11 L. T. N. S. 569, the owner of a house being allowed to open a street and construct drains, with the duty of restoring the highway to its proper condition, was held liable for the negligence of the contractor, in not properly filling up the trench opened in the street for the purpose of making the drain. Erle, C. J., delivered the opinion of the Court, reversing the decision of the Court of Queen's Bench. The ground of decision in that case was the duty of the defendant to restore the street, and his contracting with another to do it did not relieve him from responsibility.

In *Pickard v. Smith*, 10 C. B. N. S. 468, where the defendant employed a coal merchant to put in coal for him, and he did not close or watch the coal hole, so that a person passing slipped in and was injured, the Court held that he, being the owner or occupier of the cellar into which the coals were put, having opened the hole (by allowing the coal merchant to do so,) was bound to close it or protect it, so that persons lawfully passing would not be injured.

It was urged on the argument that this burning was under the control of the defendants by their engineer, and that he directed the firing to be done as it was.

The contract gave no direct control to defendants' engineer further than that the work was to be done to his satisfaction, and, if the contractor did not have a sufficient force to complete the work in time, the engineer might employ more workmen at the expense of the contractor.

In *Steel v. South Eastern Railway Co.*, 16 C. B. 550, the defendants employed their own surveyor to superintend the work, and direct what should be done under the superintendence of defendants' surveyor, who furnished the plans. The foreman of the contractor said the work was done by him and the men employed by him. On his cross-examination he said he had orders to go on from defendants' surveyor. He was the person who told him what to do. The foreman said he was the responsible person to determine in what manner that which the surveyor directed should be carried out. It appeared that the surveyor had directed the foreman to cut through only half of a certain road at once, and that the flooding resulted from the workmen having, notwithstanding his directions, cut through the whole road at once. Creswell, J., said, "If it could have been shewn that the plaintiff's land had been flooded in consequence of something done by the orders of Mr. Phillips, the Company's surveyor, it might have been said that that was the same as if Phillips had done it with his own hands, and then the company would have been responsible."

Plaintiff's first witness (Winters) said he first put fire on the railway track on the 1st July; Mr. McDougall, the

defendants' engineer, told him to do so ; Mr. McDougall did not tell him to burn on any particular day ; Mr. McDougall wanted him to proceed with the work promptly and to burn all along. He said he ordered his foreman to put fire in the timber and brush after it had been piled ; that was about the 25th July. It was the Company's engineer told him to set fire to it. "He said I would have to clear up the road. I could not do this without burning the timber."

The second witness (Elyea) said : "We had begun logging when Mr. McDougall came and asked when we would get done. He said he wished it done as fast as possible. We were logging every day and setting in fire. It was a dry season. It was dangerous to set fire then. There was no precaution taken. We first started to fire the brush about the 15th July. We commenced to burn the log-heaps about the 20th July." There was a rain in July, he could not say when.

Hugh Winters, foreman, was present when the chopping and clearing was done. He said "We got to the plaintiff's land in July. We wanted to save the timber, and in order to do so we proposed to throw the tops on the two extra rods, and to burn the brush at some convenient time. Mr. McDougall came along and told us to burn the timber on the track. He said, 'if you clear beyond the four rods, we will not allow you for more than four rods.' We felled the timber in piles in the centre, and set them on fire. It was not prudent to set fire at that time."

Mr. *McDougall* stated, he did not tell them when to put the fire in, or not to put it in. He cautioned them. He had no doubt he told them to hurry on with the work.

The evidence seems to shew, that setting fires to the log-heaps and brush at that season of the year was dangerous. Mr. Manning's evidence shews that it was so ; but he said, "The railway could not have been built without burning off the timber."

Looking closely at the evidence, I fail to see any direct interference with the workmen as to burning the timber on the place, further than insisting that it should be burned

in the centre of the track, and that the brush should not be allowed to be placed on the side of the road, as it would be likely to endanger the fences and the land of the adjoining proprietors. It may be contended, that they could not go on with the work and finish it according to their contract without burning it in July; and therefore his insisting on their getting on with their work as fast as possible necessitated lighting the log and brush heaps in July, when it was so dry as to be imprudent to do so.

The principal witness for the plaintiff says, "McDougall did not tell me to burn on any particular day." He puts it in this way, "I first set fire on the railway track about the 1st of July. McDougall told me to do so. I had commenced chopping, it was there I had been chopping. McDougall told me that all the timber I cut on the road, I must burn on the road. McDougall did not tell me to burn on any particular day."

I cannot say that the evidence shews such an interference by the engineer with the workmen, as to bring the case within the rule laid down in *Johnston v. Hastie*, 30 U. C. R. 232, and the cases there cited, and make the defendants liable on that account. The contracts themselves say nothing of the mode of clearing the land either by Ginty or Manning, or by the sub-contractors. But all seem to agree, that the only way in which it could be done was by burning the logs and brush. No doubt doing so in July, according to the evidence, was dangerous, and it seems to be admitted that in that kind of work there is always more or less danger of setting fire to adjoining premises. I apprehend, however, that with a proper staff of workman and proper precautions, it would not be impossible to prevent the spread of fire.

It has not yet been decided that when a proprietor of land contracts with a competent person to clear and fence his land, he is bound to ensure adjoining proprietors against loss, because the contractor may use fire to burn log and brush heaps, which is the usual and oftentimes necessary course to pursue in clearing lands in this county. I

do not think we are at liberty, sitting here, to over-rule the very elaborate judgment of Sir John Robinson, in *Dean v. McCarthy*, 2 U. C. R. 448, to the effect that the proprietor of land who burns off his log heaps is not an insurer that no injury will occur to his neighbors from exercising this right to clear his own land, but that he is only answerable for negligence.

Here then, the railway company, having contracted with proper and efficient persons for constructing the portion of their railway where the injury to the plaintiff occurred, according to the authorities, are not answerable for the negligence of the workmen, who, in performing their part of the work, did not take proper care of the fire which they had made use of in doing that work. Suppose instead of burning log-heaps and bush they were excavating soil, and in doing so used a machine worked by steam for that purpose. Supposing that the engineer and fireman had managed the machine so carelessly that the fire had extended from that to the plaintiff's woods, would the railway company be responsible? I should think not. Does the principle differ because they used fire directly? It can only be on the ground that it was a more dangerous mode of using the fire in the one case than in the other.

Woodhill v. The Great Western R. W. Co., 4 C. P. 451, decided that a railway company is not responsible for damage done by a sub-contractor in setting fire to brush in clearing up the defendants' track. Sir James Macaulay in giving judgment, said, "The servants of Dunn, a sub-contractor under Zimmermann, the principal contractor under defendants, were not the defendants' servants, nor did the contract require that such fires should be made, or any nuisance, public or private, be committed."

The late case of *Daniel v. The Metropolitan Railway*, L. R. 5 H. L. 61, seems to sustain the doctrine, that if an injury arises from the negligence of the servants of a contractor, that the Company is not responsible: Lord Westbury saying, "the ordinary business of life could not go on if we had not a right to rely upon things

being properly done when we have committed and entrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work." Lord Colonsay added some observations which might, perhaps, apply to a view of the case to which I may refer further on. "If the operation which the Thames Iron Works Company, (the contractors) was performing, was one which according to previous knowledge and experience, however carefully performed, was likely to lead to mischief, I think it would then be incumbent on the railway to foresee it, and to take precautions against it. * * * "The fall of the girder was not a thing which the railway was bound to contemplate as a probable or hardly possible occurrence, if due precautions were taken."

It was urged by Mr. McCarthy, that the railway company must be considered as authorizing the contractors to use fire in clearing up the track. (All parties agree that is the only way in which it could be done, and Mr. Manning's evidence fully establishes this.) He in effect contends this contract is to be viewed as a separate contract, one to cut and pile the timber and brush, the other to burn it up : that if the defendants authorized the contractors to burn it up, they were authorizing the introduction on to their land of a dangerous element which was likely to escape, and that having so authorized and directed this element to be used, they are responsible for its effects, whether it was negligently used or not : that the recent case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, shews that no matter how ignorant the owner of the soil may be as to any injury likely to be caused to his neighbor, by the act which he does on his own land, yet, if such act does injure his neighbor, he is answerable, though he may have employed competent contractors and engineers, and the injury has arisen from their want of care and skill. The case referred to was first considered in the Court of Exchequer, 3 H. & C. 774. Then it was taken to the Exchequer Chamber, L. R. 1

Ex. 265, and then to the House of Lords, L. R. 3 H. L. 330. The following is an abstract of the case: The defendants constructed a reservoir on their lands, separated from the plaintiff's colliery by intervening lands. Mines under the site of the reservoir and under part of the intervening land had been formerly worked, and the plaintiff had by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his colliery and the old workings under the reservoir. It was not known to the defendants or any one engaged in making the reservoir, that such communications existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence, but the reservoir was in fact built over five old shafts leading down to the workings. On the reservoir being filled the water burst down the shafts and flowed by the underground communication into plaintiff's mines. The defendants employed competent engineers and contractors by whom the site was selected, and the reservoir planned and constructed. On the part of defendants, there was no personal negligence or default, but reasonable and proper care and skill were not exercised by the persons they employed to provide for the sufficiency of the reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear.

In the Exchequer, the Court held, dissenting Bramwell, B., that the defendants were not responsible for the damage done the plaintiff.

Martin, B., in giving judgment, 3 H. & C. 793, said, "To hold the defendants liable would make them insurers against the consequence of a lawful act upon their own land when they had no reason to believe or suspect that any damage was likely to ensue." He then argues that the true doctrine is that no person can be held responsible for such acts unless he has been guilty of negligence, and if there is no negligence on his part the party sustaining damage must bear it. He refers to the exceptions engrafted on the rule as to innkeepers and common carriers, who are *quasi* insurers.

He adds, "There is an instance also of damage to real property, when the party causing it was at common law liable upon the custom of the realm as a *quasi* insurer : viz., the master of a house, if a fire had kindled there and consumed the house of another. In such case the master of the house was liable at common law, without proof of negligence on his part ; Com. Dig. Action on the case for negligence, A. (6). This seems to be an exception from the ordinary rule at law." In the argument, at p. 784, the counsel stated the liability as to fire, formerly an absolute duty to insure against all mischief caused to your neighbor by fire arising on your own property, is said to have been by the custom of the realm, *Tubervil v. Stamp*,¹ Salk, 13 ; Com. Dig. Action on the case for negligence, A. (6). And since the passing of 14 Geo. III., ch. 78, and the decision on section 86 of that act in *Filliter v. Phippard*, 11 Q. B. 347, the liability for injury by fire is restricted to mischief arising from negligence. That is, it is put on the same footing as liability for other injuries. The sum of the argument is, that to make the defendant liable a wrongful act must be shewn, and to prove that act wrongful you must prove it negligent.

Blackburn, J., gave the judgment in the Exchequer Chambers, which seems a most elaborate and exhaustive one, L. R. 1 Ex. 279. He said, "What is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land ? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors ; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is as a majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there some-

thing dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

“Supposing the second be the correct view of the law, a further question arises subsidiary to the first, viz., whether the defendants are so far identified with the contractors whom they employed, as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient, with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

“We think the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escape, must keep it in at his peril, and if he do not do so is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff’s default ; or perhaps that the escape was the consequence of *vis major*, or the act of God ; but as nothing of this sort exists here, it is unnecessary to enquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour’s reservoir, or whose cellar is invaded by the filth of his neighbour’s privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour’s alkali works, is damnified without any fault of his own ; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour’s, should be obliged to make good the damage which ensues if he do not succeed in confining it to his own property. But for his act in bringing it there

no mischief could have accrued, and it seems just that he should at his peril keep it there, so that no mischief may accrue ; or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenchcs." The learned Judge then proceeds elaborately to review the authorities. He adds that the view they took of the case rendered it unnecessary to decide whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them to construct the reservoir.

It will be observed that the case of setting fire to stubble on a man's own land which extended to his neighbours, doing damage, was referred to on the argument, and the reference to Comyn was cited ; yet in the very able judgment of Blackburn, J., referring to things brought on a party's lands which escapes to his neighbors, doing damage for which he is answerable whether guilty of negligence or not, fire is not amongst them. He speaks of beasts, water, filth, and stenchcs, but does not refer to fire.

The case of *Sérandat v. Saësse*, on appeal from the Supreme Court, of Mauritius, L. R. 1 P. C. 152, was decided before *Fletcher v. Rylands* was brought before the Exchequer Chamber so that case could not be considered when disposing of the case from the Mauritius ; but if the doctrine in the case referred to would have applied to the bringing of fire on the land, it seems strange it was not suggested in disposing of that case.

If the agreement with the contractor was to set fire to and burn the logs and brush, that certainly would authorize and must be a direction to use fire.

And if the owner of the land directed the use of fire, and was responsible for any injury that might arise from its use, whether the injury arose from carelessness or not, then the maxim *qui facit per alium facit per se* would apply, and he would be answerable.

But if the using of fire was justified, and he who used it was only liable for negligently using it, then the party who was guilty of the negligence would be answerable.

If that party was not the servant of the owner, but of the contractor, and did not do the negligent act by the owner's authority, then in this view the owner would not be liable.

Much of the reasoning in the case of *Fletcher v. Rylands* would apply to fire as one of the things which, if a man brings on to his land, he is bound to see that it does no harm to his neighbor.

The case of *Dean v. McCarthy* in our own Court already referred to, 2 U. C. R. 448, takes the view that it is a question of negligence, and the declaration in this cause is framed in that view. I do not think we can here properly overrule *Dean v. McCarthy*.

I therefore think the rule should be absolute to enter a nonsuit.

I think the finding of the jury as to the damages for the fire which occurred after the month of August is not satisfactory.

The plaintiff himself seemed to consider his claim was perfect for damages on the 7th of August, when his attorneys wrote to the defendants claiming damages, and the weight of evidence seems to shew that the fire after that arose from other causes than the fires first referred to. I should, if the plaintiff's right to maintain the action were established, grant a new trial unless the verdict was reduced to \$750.

Rule absolute to enter a nonsuit.

HOOD V. THE HARBOUR COMMISSIONERS OF THE CITY OF TORONTO.

Verdict with leave to move—Practice.

In an action for damages to plaintiff's vessel, from obstructions in defendants' harbour, and in which the defendants denied any liability, it was agreed at the trial, after evidence had been given on both sides, to refer the amount of damages to one P., if the Court should be of opinion that defendants were liable; the Court to decide the liability, with power to draw inferences, and leave was reserved to move to enter a nonsuit on the whole case. A verdict was then entered for the plaintiff for \$2,000. The arbitrator on the day before Easter Term following made his award, fixing the damages at \$1679, but defendants' attorney did not know it until the last day of the term.

Held, that the verdict was in effect subject to the opinion of the Court, and that the Court not having decided the liability, the failure of the defendants to move for a nonsuit in Easter Term did not give the plaintiff the right to recover.

DECLARATION, for not maintaining the Harbour in a proper condition safely to be navigated, and for not giving notice of obstructions by a buoy, by means of which the plaintiff's vessel ran against the obstructions and was injured.

Pleas. 1. Not guilty. 2. Denying the duty of defendants as alleged. 3 and 4. That the obstructions, and the soil on which the same were, were the property of one Dixon, and were not the property of nor vested in defendants, nor had defendants power over the same. Issue.

The cause was tried at the York Spring Assizes, 1872, before Hagarty, C. J. C. P.

At the conclusion of the plaintiff's case, the counsel for defendants moved for a nonsuit, because there was no evidence to show that the piers or obstructions were vested in defendants, or that they had the power to interfere with any private property or obstructions made by private parties; and that there was no general control of the Harbour; nor was the Harbour itself vested in the defendants; that the property causing the injury must be shewn to have been held by the defendants, and the Harbour belongs to the City Corporation.

It was agreed that leave should be reserved to move to enter a nonsuit on these objections.

Evidence was then given for the defendants.

At the close of the evidence, it was agreed between the parties that it should be referred to Mr. William Pierce to decide what the plaintiff's damages should be assessed at, if the defendants were held liable; the Court to decide the liability, with power to draw inferences; and leave was reserved to move a nonsuit on the whole case. The verdict was then entered for the plaintiff for \$2,000.

The affidavit of Mr. *Gamble*, acting for the defendants, shewed that the parties, by their counsel, attended before Mr. Pierce, there having been no written or formal reference of the matter, who estimated the damages at \$1,679; and that he (Mr. *Gamble*) did not know of the award having been made until the 12th of June, 1872, when the plaintiff's attorney, in answer to a note which Mr. *Gamble* had written to him, asking if the time for making the award had been enlarged, informed him the arbitrator had made his award before Term.

The plaintiff's attorney threatened to enter up judgment, and an application was made in Chambers; and by an order of Mr. Dalton, dated the 16th of October last, all proceedings were stayed in the cause until the then following Term.

In this Term *J. H. Cameron*, Q. C., obtained a rule in the Practice Court, calling on the plaintiff to shew cause why all proceedings herein should not be stayed, until the legal questions reserved at the trial were disposed of by the Court; or for a new trial, the verdict being contrary to law and evidence. That rule was made returnable in the full Court, where Mr. *Cameron*, also in this Term, obtained leave to issue a rule, calling on the plaintiff to shew cause why a nonsuit should not be entered on the leave reserved, or a new trial be granted.

This last rule was not issued. It was moved to prevent any further delay in case the Court should be of opinion the application was still in time, or that the plaintiff must get the legal liability of the defendants established before he could proceed upon his verdict.

Harrison, Q. C., shewed cause to the rule granted in the Practice Court. It was the defendants' duty, when the plaintiff had a verdict not subject to the opinion of the Court, nor to a case to be stated for the Court, but a verdict against which the defendants had only leave reserved to them to move, to make their motion in time, according to the practice of the Court, and the defendants have not done so. The award was made on the day before last Easter Term. The defendants should therefore have moved their rule by the end of the first four days of that Term, which began in May last: *Winterbottom v. Lord Derby*, L. R. 2 Ex. 323. Reg. Gen. 40, *Har. C. L. P. Act*, 2nd ed. p. 646. By sec. 336 *Har. C. L. P. Act*, 2nd ed. p. 443, these rules acquire the force of a statute. The section says they shall be "binding and obligatory": *Ellaby v. Moore*, 13 C. B. 908; *Sutton v. Craig*, 4 L.T. N. S. 217 English Rule H. T. 53; *Copcutt v. Great Western Railway*, L. R. 2. C. P. 465 and other cases cited in note *w*, *Har. C. L. P. Act* 2nd ed. p. 646 support the contention. The case of *Lord Ward v. Lumley*, 5 H. & N. 656 referred to by Mr. *Cameron* in Chambers depended on the words of the statute under which it was decided, and has no application here. It appears then the Court have no power to interfere now against the plaintiff's rights, because the rule is part of the Act of Parliament. But if it could do so, this was not a case in which it should be done: *The Queen v. Miller*, 23 U. C. R. 206; *Newton v. Boodle*, 4 D. & L. 464, S. C. 3 C. B. 795; *Lawrie v. Russell*, 1 P. R. 36; *Smith v. Rooney*, 12 U. C. R. 661.

J. H. Cameron, Q. C., supported the rule. It was agreed the Court should decide the legal rights of the parties, and that has not been done. It was left to the Court to draw inferences. The plaintiff therefore had never a perfect verdict, and it was his place to move the Court. As a fact the defendants did not know of the award having been made till the last day of Easter Term: *Boulton v. Pritchard*, 4 D. & L. 117, S. C. 11 Jur. 64; *Betts v. Menzies*,

11 W. R. 88 Q. B.; S. C. 28 L. J. Q. B. 361; *Kelner v. Baxter, et al.* L. R. 2 C. P. 174; *Lord Ward v. Lumley*, 5 H. & N. 656; *Daniel v. The Metropolitan Railway Co.*, L. R. 5 H. L. 45. The rule of Court on the subject has not the effect of a Statute, which the Court cannot avoid or relieve against, and if it had there is sufficient to shew a waiver. Defendants are entitled to a stay of proceedings till the legal question is considered.

WILSON, J., delivered the judgment of the Court.

It is impossible to read the notes of the learned Chief Justice, without seeing that nothing of any kind was decided, or desired, or attempted to be decided. The damages were to be settled by a referee, and the legal rights by the Court.

The defendants had leave reserved to move; but if they did not do so, that did not give the plaintiff a right to recover, because the Court had expressly to determine that.

Regina v. Miller, 23 U. C. R. 206, shews the Court had the power, on the authority of *Lord Ward v. Lumley*, 5 H. & N. 656, to give relief, even against the limitation fixed by Statute, because the discretion of the Court is not thereby taken away: *Kelner v. Baxter*, L. R. 2 C. P. 187.

When the Court, on the last day for moving, rose unexpectedly at an early hour, a rule *nisi* for a new trial was allowed to be moved on the following day: *Boulton v. Pritchard*, 4 D. & L. 117 S. C., 11 Jur. 64.

In *Daniel v. The Metropolitan Railway Co.*, L. R. 5 H. L. 45, it is said, "Where the plaintiff has closed his evidence and the Judge who tries the cause is of opinion that there is no case to go to the jury, he ought to direct accordingly, giving leave, if necessary, for the plaintiff to move to enter a verdict in his favor. But it is erroneous under such circumstances to take a formal verdict for the plaintiff, reserving leave to the defendant to move."

On a special verdict, the plaintiff must have it made up and duly entered if he wish to proceed on it. The same with a verdict subject to a special case.

So also the general rule is, that the party aggrieved by the verdict is the one who should move against it.

Here neither party is aggrieved, because nothing has been done against either of them. The Judge did not decide nor attempt to decide the legal rights of the parties, but referred them to the Court for that purpose.

The substantial meaning of that must surely be, in whatever form of words it may be expressed, that the legal rights had to be determined before the verdict should be absolute; or, in other words, that the verdict was in effect subject to the opinion of the Court.

The rule, we think, must be made absolute, but without costs.

Rule absolute.

WOOLLEY ET AL. V. HUNTON ET AL.

Unstamped foreign bill accepted in Canada—Affixing double duty by agent of foreign payee.

Declaration on a foreign Bill of Exchange drawn in London, England, on defendants, and accepted by them in Canada, payable to the plaintiffs. Plea, that the bill was not stamped at the time of acceptance, nor the stamps cancelled, nor were double stamps affixed by the plaintiffs after they acquired the knowledge that it was not properly stamped.

Replication, that the bill was duly stamped in England according to the law of England: that it was returned to the plaintiffs by defendants accepted but not stamped; and that without any delay, and in a reasonable time, the plaintiffs transmitted the bill" to S. & W. in this Province, and caused them to pay the double duty, by affixing stamps to the amount thereof.

Held, on demurrer, replication good; for that upon delivery of the bill by defendants to plaintiffs after acceptance the plaintiffs became "subsequent parties to such bill, within 31 Vic. ch. 9 sec. 12 as amended by 33 Vic. ch. 13 D, and were entitled therefore to make it valid by paying the double duty.

Held, also, that the replication sufficiently alleged the due payment by plaintiffs of the double duty through S & W. as their agents.

Held, also, that the replication should have set out the amount of the double stamps affixed, and the mode of cancellation; but that this was not ground of general demurrer.

DEMURRER. Action by the drawers and payees of a foreign bill of exchange, drawn in London, England, dated

the 1st of March, 1872, for £607 1s. 10d. sterling, upon the defendants, and accepted by them.

Second plea. That the said bill was accepted by the defendants in Canada, and that there was not affixed to the said bill at the time of the acceptance thereof by the defendants in Canada, the adhesive stamp or stamps required by law to be affixed thereto, or any stamp or stamps whatever, as required by the Statute in that behalf; nor was the said bill made on paper stamped in the manner and to the amount of the duty required by the said Statute, or to any amount of duty; and the plaintiffs did not, after they acquired the knowledge that such stamps were not affixed at the proper time, pay the double duty thereon by affixing to the said bill a stamp or stamps to the amount thereof, and writing their signatures or part thereof, or their initials, or the proper date, on such stamp or stamps, as required by law. And the said bill by reason of not having such stamp or stamps is invalid in law and equity.

Replication. That the said bill of exchange was drawn by the plaintiffs in parts beyond the seas, to wit in England, as in the declaration is alleged, and was duly stamped by them as by the law of England is required, and was afterwards returned to the plaintiffs by the defendants duly accepted by the defendants, but without being stamped by the defendants according to the law of this Province, as by the said plea is alleged. And that without any delay, and in a reasonable time, the plaintiffs transmitted the said bill to certain persons, to wit to Larratt William Smith and Samuel George Wood, then being in this Province, and caused the double duty on the said note to be paid by the said Smith and Wood by affixing to the said bill stamps to the amount thereof, and the said Smith and Wood did within a reasonable time after the receipt by them of the said bill, and before the commencement of this action, pay the double duty thereon by affixing stamps to the said bill to the amount thereof, and duly cancelling the same, according to the law of this Province.

Demurrer to the replication, on the grounds, that it does not allege or shew that the double duty was paid as soon as the plaintiffs knew the proper duty had not been paid, nor shew a compliance with the Statute ; and it does not shew that Smith and Wood were ever the holders of the bill, or parties to it, or that the bill was ever properly stamped, or ever became a valid bill, or that the acceptance was ever valid or binding. Joinder.

During this Term, *S. Richards*, Q.C., supported the demurrer. Foreign bills must be stamped if accepted in Canada. The stamps should be affixed when the bill is drawn; there is nothing in the Act authorizing a reasonable or any delay. The plaintiffs could not attach the stamps as if they had done so themselves at the time they were put on, because they are not subsequent parties to the bill. Smith & Wood could not do it for them, if they were acting for the plaintiffs. It does not appear they did act as agents for the plaintiffs, and they had no right to attach the stamps on their own account, because they are not parties to the bill. The amount of stamps affixed for double duty and the mode of cancellation should have been stated: Dominion Act of 1867, ch. 9, secs. 1, 3, 4, 11, 12; Dominion Act of 1870, ch. 13; *Henderson v. Gesner et al.*, 25 U. C. R. 184; *Kirby v. Hall*, 21 C. P. 377.

Anderson, Q. C., contra. The plaintiffs were entitled, under the Statutes referred to, to pay the double duty upon the bills coming into their hands after acceptance, as soon as they acquired knowledge that the duty had not been paid by the proper party or at the proper time. And the replication shews they did so, by Smith & Wood as their agents. No analogy can be drawn from the English Act, as there is no power to affix stamps there after the bill is drawn.

WILSON, J., delivered the judgment of the Court.

It may be better to examine the Acts just so far as they are applicable to this case. By the Act of 1867, sec. 1,

a duty is payable upon and in respect of every bill of exchange accepted in Canada.

By sec. 4, the duty is to be paid by *making* the note, draft, or bill upon paper stamped, or by affixing stamps to the amount of the duty thereto, upon which the signature or part of it, or in the case of a bill drawn or made out of Canada, of the acceptor or first endorser in Canada, or his initials, shall be written, with the date of affixing.

By sec. 10, the stamps are to be affixed (in the case of bills drawn out of Canada) by the acceptor or first endorser in Canada, and failing to affix such stamps, or sufficient stamps, "*at the time of accepting or indorsing,*" he shall incur a penalty.

By sec. 11, as amended by the Act of 1870, 33 Vic. ch. 13, D, any person in Canada who accepts, indorses, or becomes a party to any bill *before* the duty (or double duty, as the case may be) is paid, shall incur a penalty; and save only in the case of payment of double duty, as in section twelve provided, such instrument shall be invalid and of no effect in law or in equity, and the acceptance, or payment, or protest thereof, shall be of no effect.

By sec. 12, as amended by 33 Vic. ch. 13, any subsequent party to such instrument, or person paying the same, or any holder without becoming a party thereto, may pay double duty, and by writing his signature, &c., according to the 4th section; and when the validity of the bill is questioned by reason of the proper duty not having been paid, or not having been paid by the proper party, or at the proper time, and it appears that the holder thereof, when he became holder, had no knowledge that the proper duty had not been paid by the proper party, or at the proper time, such instrument shall, nevertheless, be held to be legal and valid, if it shall appear that the holder thereof paid double duty so soon as he acquired such knowledge, &c.

These enactments shew, that on this bill, drawn out of Canada, and accepted by the defendants in Canada, the

stamps should have been affixed by the defendants at the time they accepted the bill.

Having accepted the bill before they affixed the stamps, they became liable to the penalty of \$100, and the bill and acceptance became of no effect, "save only in the case of payment of double duty, as in the next section provided."

And the question is, whether that saving is available to the plaintiff upon the facts in the replication stated?

There are three persons who are permitted by the 12th section to make the bill valid by paying double duty.

1. Any subsequent party to the instrument. 2. Or the person paying the same. 3. Or any holder, without becoming a party thereto.

The plaintiffs are not within the second or third classes.

Are the plaintiffs subsequent parties to such instrument? They drew the bill payable to themselves, and addressed it to the defendants, and requested them to accept it.

At the time the plaintiffs drew the bill, and had it in their own hands, it was of no value. It was not a negotiable instrument; it is payable to the plaintiffs alone, and not to their order or to bearer.

At the time the defendants had it in their hands for acceptance, and before acceptance, it was of no value.

It was the acceptance of the defendants which gave it value and made it a complete bill of exchange, as soon as they afterwards delivered it to the plaintiffs. That subsequent delivery of the bill to the plaintiffs made them in fact subsequent parties to it, as they were and are subsequent parties to it in point of law as payees.

Every promissory note is drawn payable to a particular person, before it is signed by the maker. It is the maker's signature which gives the note effect and validity, the payee is then a subsequent party to such instrument.

If therefore the acceptors, as in this case, or the maker, as in the case of a note, have not paid the proper duty on the instrument at the time of the acceptance or making, the drawer or payee, on subsequently getting the complete

instrument from the acceptor or maker, may, as a subsequent party to the instrument, make good the default of the primary party by paying the double duty under the Statute, and render the instrument valid at law and in equity.

If this were not so, there might be the most pernicious frauds perpetrated.

In this case the plaintiffs, when they drew on the defendants, may not have known of our stamp law, or the amount payable under it; or if they did, they might not and could scarcely be expected to have been able to provide themselves with the proper stamps. But, even if they could have procured the stamps, it was not their place to do so. It was the duty of the acceptors when they accepted the bill to attach the stamps.

It is not going too far to say, that they must be presumed to have known this. If they did, they knew they were giving back to the plaintiffs, so far as they, the defendants, could make it, a worthless acceptance.

It would be unfortunate, if the plaintiffs had no way of remedying such an omission, the default being in no way chargeable to them.

The next step is to see whether they have duly paid the double duty?

The replication is an answer to the plea. If the plea had more accurately followed the Statute, the replication might still have been found sufficient.

The putting on of the double stamps by Smith & Wood was done by them for the plaintiffs, or in law by the plaintiffs, because the replication says the plaintiffs caused it to be done. No exception has been taken to the cancellation by Smith & Wood, although that too may be attributed to the same act of agency.

It was objected on argument, though no written exception has been taken to it, that the affixing of double stamps and cancelling the same according to law, is an improper allegation of fact. No doubt it is so. The amount of the stamps affixed for double duty should have

been stated, and the act done to effect cancellation should also have been stated.

As it stands at present, the jury cannot say what amount will be sufficient for double stamps, nor what acts will be a proper cancellation, and yet they are required to determine them both. That is a ground of special demurrer only.

The Court might, however, if the opposite party were embarrassed by such a mode of pleading, compel the party to amend. There does not seem to be that difficulty here.

The judgment will be in favour of the plaintiffs on the demurrer.

Judgment for plaintiffs.

RE McMICHAEL AND THE CORPORATION OF THE TOWNSHIP
OF TOWNSEND.

*Municipal Act, secs. 325, 326, 334—By-law to open original road allowance—
Want of notice—Want of form.*

Upon an application to quash a by-law to open an original road allowance, on the grounds—1. That a travelled road in lieu of it, had been laid out, and no compensation made to the owners of the land taken. 2. Of inconvenience to the applicant and others, if the road were opened. 3. That it would pass through the orchard and close to the house of the applicant, which had remained in their present position for over twenty years. 4. That sufficient notice of intention to pass had not been given. 5. That the by-law did not declare the road opened, but directed that the occupiers of the lots through which the road passed should open it.

Held, that upon the affidavits, set out below, the first four objections failed, and that the case was one within sections 335 and 326, and not section 334, of the Municipal Act of 1866.

Held also, that the fact that the occupiers were directed to give up possession and to open the road by a certain date, afforded no legal objection to the by-law, but the direction might be treated as a notice that it was the intention of the Council to open the road at the time named.

DURING this term, *Anderson, Q. C.*, obtained a rule *nisi* calling on the Corporation of the Township of Townsend, to shew cause why a by-law, passed on the 16th of September, 1872, entitled "A by-law to open the road allow-

ance between lots six and seven, from the Canada Southern Railway to the 11th concession line, in the Township of Townsend," should not be quashed on the following grounds :—

1st. That a travelled road instead of the original road allowance having been opened on lot seven, sufficient for the purpose of a public highway, and for which no compensation has been paid to the owners of the land appropriated for said highway, the said applicant is entitled to such original allowance in lieu of the road so laid out.

2nd. That the opening of the said allowance would greatly inconvenience the applicant and other proprietors.

3rd. That the said allowance, if opened as a road, would pass through the orchard of the applicant, which has stood in its present position for more than thirty years, and would pass within about a foot of the applicant's house, which has stood in its present position for more than twenty years.

4th. That there was not sufficient publication of intention to pass the by-law to open the said road allowance, according to the statute.

5th. That the by-law does not declare the allowance opened, but directs the occupiers of the lots through which the allowance passes to open said allowance.

The rule was obtained on an affidavit of the applicant which set out, that since 1858 the only road crossing lot seven, in the ninth concession, was the road now used and called the "Waterford and Simcoe Road Company's Road," and the only highway crossing that lot : that from that time, the original allowance for road on the west side of lot seven was, and is still, enclosed by the owners, from time to time as far south as the Road Company's road first touches lot seven, and from thence north to the eighth concession : that from 1858 the same persons have owned the land on both sides of said public road or highway, from time to time, for all the distance the same passes this lot seven ; and that David Duncomb owns the north part of said lot seven on both sides of the said public road, and

the applicant owns from Duncomb's land, all the rest of the said lot seven, through which the public road passes on both sides thereof: that since 1858, the original road allowance on the west side of lot seven has been enclosed and used continually as part of lot seven by the respective owners thereof: that the public road runs within a few rods of the length of said lot, across or through the same, and that the original road allowance has never been opened along any part of lot seven: that the Road Company have a toll gate where their road crosses Duncomb's land; and that the effect of opening the original allowance in question will be to avoid payment of tolls upon the gravel road at such toll gate; and that the applicant is a stock holder in such road company: that if the original allowance is so opened, it will go through the applicant's orchard, destroying his fruit trees and injuring his garden, and will run within a foot of his house: that the applicant purchased his part of lot seven, about three years ago, and the orchard and garden were then in the same place as now: that he remembered the place for about 14 years, and the orchard and garden existed as now during all that time; and that the value of his place would be seriously injured if the original allowance were opened. And he further stated that he was satisfied no compensation was ever paid to the owners of lot seven for the land taken for the present public road, but that the same was taken in lieu of said original allowance without compensation.

This affidavit of the applicant was corroborated by the affidavits of William McMichael, Barton Becker, and David Duncomb, in all the material facts, the latter swearing, to his knowledge, of the existence of the present travelled road from 1824.

In support of the application were also filed the affidavits of two surveyors, who stated that the present public road, crossing lot seven, was sufficient for the purposes of a highway without opening the original allowance in question.

The by-law was as follows:—"A by-law to open the

road allowance between lots six and seven from the Canada Southern Railway to the eleventh concession line in the Township of Townsend.

"Whereas a great number of the inhabitants of the south part of the Township of Townsend, are inconvenienced on account of the first quarter town line not being opened, and that a number of the freeholders and householders, amounting to upwards of three hundred persons, having petitioned the council, praying that the government allowance of road between lots six and seven, commencing at the Canada Southern Railway in the eighth to the eleventh concession line, in the Township of Townsend, be opened, and praying that this council take action to accomplish the said object.

"Be it therefore enacted by the Municipal Council of the Township of Townsend in Council assembled, and it is hereby enacted, that every person or persons having enclosed or occupying any part or parts of said quarter town line, shall be required on or before the first day of November next, to give up possession and open the same for the use of the public travel; the same to be made by gratuitous or statute labor; and be it further enacted that this council shall not be required at the present to appropriate any money in aid thereof."

On the part of the corporation, were filed twenty-six affidavits of persons in the vicinity and living in the line of the road allowance in question, and the original settlers in that part of the Township. These affidavits accounted for and shewed the circumstances under which the present road originated, and the non-user of the road allowance now required to be opened. The affidavits of persons whose land abutted on this road allowance shewed in what way the owners of lot seven happened to fence in the road allowance—viz., that when the owners of that lot cleared up their land to their western limit, *i.e.*, to the road allowance, as the allowance was not then used, they joined their fence to the eastern line fence of the owners of lot No. six, for the purpose of saving the expense of a double fence—one on

each side of the unused road allowance. These affidavits also shewed, in the most positive terms, that the present travelled road was not laid out, or taken, or adopted in lieu of the road allowance in question; and that no compensation was ever claimed by the owners of lots six or seven, nor was the road allowance claimed in lieu thereof; but that, on the other hand, from the earliest period down to the present time, the original and other owners of the land abutting on the road allowance, enclosed and used the road allowance in question, upon and with the expectation that they would have to open it up when it would be required for the public use; and one of the present owners of land, then the son of the former owner, and under whom the applicant claimed title, stated, as to the planting of the orchard trees in the allowance for road, that they were planted at the time knowing that they would be liable to be cut down, and with that expectation, when the allowance would be required to be opened for the use of the public. The affidavits also shewed that, if the road allowance was to remain unopened, as it is, it would cause great inconvenience to the proprietors of land abutting thereon, and persons living in that vicinity. From the affidavits filed by the corporation, it appeared that the parties interested had notice of the intention to pass the by-law.

During this term, *Wood*, Q. C., shewed cause. The affidavits filed by the corporation shew conclusively that the applicant did get notice of the intention to pass the by-law to open the road, if any notice were necessary; and he contended none was necessary, referring to the Municipal Act, sections 315, 316, 317, 320, 323, 333, 334, 335, 336. The evidence shews also that this is not a case within section 334 of the Municipal Act, under which the application was made. No compensation has ever been paid, and no other road has been laid out in lieu of the original road. The manner in which the fences came to be put up originally shews that the owners at that time never expected or intended to retain the land. The case of *Burritt*

and the Corporation of the Township of Marlborough, 29 U. C. R. 119, which will be relied on in support of the application, is distinguishable. There another road, given in lieu of the allowance, had for many years been travelled. As to the form of the by-law, it is sufficient when read with the preamble.

Anderson, Q. C., supported his rule. The case is within *Burritt and the Corporation of the Township of Marlborough*, 29 U. C. R. 119. Notice is required by section 23, and has not been given. The by-law is insufficient in form: sec. 335. The by-law does not declare the road open, and the corporation has no power to order the parties along the road to open the road.

MORRISON, J., delivered the judgment of the Court.

It is quite apparent, from the affidavits filed, that the present travelled road across lots six and seven was not given in lieu of the road allowance in question, nor was the road allowance taken in compensation for, or in place of such travelled road. The origin of the latter, as well as the enclosing in and the user of the road allowance, and the planting of the fruit trees referred to by the applicant, are satisfactorily accounted for; the affidavits shewing that neither of these acts were done by the proprietors with a view of acquiring any title to the original road allowance, but done for their temporary purpose and convenience, and subject to the allowance being opened and used whenever the public necessity required that it should be so.

Burritt and the Corporation of the Township of Marlborough, 29 U. C. R. 119, was referred to by Mr. Anderson as an authority in his favor. That decision does not apply; that case turned upon the effect of the 334th section of the Municipal Act. The road there had been travelled for 60 years, and the facts sworn to, and the peculiar circumstances appearing, warranted the conclusion that the travelled road was opened and given in place and in lieu of the original concession line, and that was the prin-

cipal ground upon which the judgment of the Court proceeded. Here the affidavits clearly negative such a state of things.

This case is one to which the 335th section of the Municipal Act rather applies, and no doubt the by-law was passed with a view to the provisions of that section, which enacts, "that in case a person be in possession of any part of a government allowance for road laid out adjoining his lot, and enclosed by a lawful fence, and which has not been opened for public use by reason of another road being used in lieu thereof, * * such person shall be deemed legally possessed thereof as against any private person until a by-law has been passed for opening such allowance for road by the Council having jurisdiction over the same." And the following section, 326th, provides that, "no such by-law shall be passed until notice in writing has been given to the person in possession, at least eight days before the meeting of the Council, that an application will be made for opening such allowance." The proper notice appears by the affidavits filed to have been given.

But it was objected that the by-law ought to be quashed, as it directs the occupiers of the lands to open the original allowance. On examination of the by-law, we cannot say that there is any legal objection to the by-law, because it states that persons having enclosed or occupying any part or parts of the original allowance shall be required, on or before the first day of November thereafter, to give up possession and open the same, for the use of the public travel.

The by-law is, in effect, a notification to such parties, that after the day named the road allowance will be opened for the use of the public, when the Council will take the steps for that purpose.

It is inartificially expressed, but can do no harm, and we see no ground for quashing the by-law.

The rule will therefore be discharged with costs.

Rule discharged.

DREDGE V. WATSON.

Insolvency—Composition and discharge—Pleading.

To an action upon promissory notes by the payee against the maker the defendant pleaded that after giving the note he made a voluntary assignment in insolvency, and thereby obtained a discharge by a deed of composition and discharge duly executed under the act, in the schedule to which the plaintiff appeared as a creditor. The plaintiff replied, setting out the composition deed verbatim. It purported to be made between defendant of the second part, and twenty eight persons of the first part, described as "all the creditors of said insolvent constituting more than the majority in number of those of the creditors of said insolvent who are respectively creditors of said insolvent for sums of \$100 and upwards, and representing more than three-fourths in value of their liabilities which are subject to be computed in ascertaining the proportion in number and value of his creditors who have executed these presents." From this it appeared that three creditors were named in the schedule for an aggregate amount of \$1,276 who were not named in the deed as parties, though two of them had executed it. The replication was demurred to, and exceptions taken to the plea.

Held, that the plea was bad, in not shewing that the deed was made for the benefit of all the creditors; and that the replication to it shewing that the deed was in fact not so made, and that it had not the assent of those creditors who represented three fourths of the value of his liabilities which were subject to be computed for that purpose, was good.

Held, also, that the plea was defective in not shewing that defendant was a trader, but that the replication setting out the deed in which he was described as merchant cured this defect.

It is not necessary that an assignee in insolvency should be a party to a deed of composition and discharge.

Held, also, that it was not necessary here, though in some cases it would be, to aver that the parties to the deed were creditors within the meaning of the Act, or to negative the plaintiff being a special creditor, it appearing sufficiently from the nature of the claim sued for that he was not.

DEMURRER.

Action by payee against the maker of three promissory notes, payable to the plaintiffs by the name of A. Dredge & Co.

Plea: That after the accruing of the causes of action in the declaration mentioned, and before action, the defendant became insolvent and unable to pay his debts in full, and thereupon, by a deed of composition and discharge made between the several creditors of the defendant in the said deed mentioned, of the first part, and the defendant of the second part, and bearing date the 20th of November, A.D.

1871, and made in accordance with the terms of the Insolvent Act of 1869, and which was executed by the said several parties thereto of the first part, creditors of the defendant, and by the defendant the said several persons parties of the first part, in consideration of a composition of forty cents on the dollar on the amount of their respective claims, to be paid in the manner in the said deed set forth, did agree that he, the said defendant, should be absolutely freed and discharged from all his debts and liabilities to the said parties of the first part: that defendant executed the said deed, and did thereby agree to pay the said composition of forty cents on the dollar on the respective claims of the said parties of the first part, and of all other just claims against defendant in six, twelve, eighteen, and twenty-four months from the first day of January ensuing the date of the deed.

And it was agreed by and between the said parties to the said deed, that whenever the defendant should have given to the parties of the first part his several promissory notes agreeing to pay the parties of the first part the said composition of forty cents on the dollar on their respective claims on the days and times above mentioned, that is, in six, twelve, eighteen, and twenty-four months respectively, or should have deposited the said notes, or so many of the same as were not delivered to them, the said parties of the first part, to whom they were respectively payable, with the assignee hereinafter mentioned, and should also have deposited with the said assignee his, the defendant's, promissory notes sufficient to pay the above proportion on all other just claims against the said defendant, and which said promissory notes should be made payable to the persons who had just claims against the defendant, and should be for the amount coming to them at the rate aforesaid on their respective claims, and also should deliver to the said assignee promissory notes sufficient to pay the same proportion on all other just claims which might at any time thereafter appear to be due and payable by the said defendant, that then and immediately thereafter the defendant

should be released and discharged of and from all his liabilities under and by virtue of the said deed of composition and discharge, and of the said Insolvent Acts.

The defendant further saith that he fully complied with the terms of the said deed, and made and delivered his promissory notes and made all the payments required to be made by the said deed. And that the said deed of composition and discharge was immediately after its execution, and before the commencement of this suit, and before the notice hereinafter mentioned, delivered, together with the promissory notes required thereby, to George Stevenson, Esquire, one of the Official Assignees in and for the county of Lambton, and the defendant was at all the said times a resident of the said county; that the said deed was before the commencement of this suit duly filed in the office of the Clerk of the County Court of the county of Lambton, and notice of the said filing and of the intention of the defendant to apply for a confirmation thereof and discharge was duly given and advertized in the *Ontario Gazette* and in the *Sarnia Weekly Canadian*, the same being the newspaper published nearest the place of the residence of the insolvent; that more than one month has elapsed since the said notice was given and advertized, and that no opposition has been made to the said deed by any of the creditors of the defendant.

And the parties of the first part who executed the deed were creditors of the defendant, and were a majority in number of all the creditors of the defendant, and their respective claims amounted each to more than the sum of \$100, and their claims in the aggregate amounted to more than three-fourths in value of the liabilities of the defendant.

That on the 24th of January, A.D. 1871, the said defendant made and executed a voluntary assignment under the provisions of the said Insolvent Act of all his estate and effects to the said George Stevenson, one of the official assignees in and for the said county of Lambton. And at the time of the execution of the said deed and of

the said assignment the plaintiff was a creditor of the defendant in respect of the causes of action set forth in the said declaration and in this cause, and his name was inserted in the schedule of creditors annexed to the said deed.

Third replication. That the deed of composition and discharge in the said plea mentioned is in the words and figures following, that is to say :

"This deed of composition and discharge, made and executed under the provisions of the Insolvent Act of 1869 and amendments thereto, between the commercial firm of Court McIntosh & Co. (Here follow the names of other commercial firms)—John R. Gemmill, publisher, William Stewart, Merchant. (Here follow the names of other creditors with their additions as "publisher," "merchant," &c.,) creditors of Ebenezer P. Watson, of the said town of Sarnia, merchant, insolvent, being all the creditors of the said insolvent constituting more than the majority in number of those of the creditors of the said insolvent who are respectively creditors of the said insolvent for sums of \$100 and upwards, and representing more than three-fourths in value of their liabilities which are subject to be computed in ascertaining the proportion in number and value of his creditors who have executed these presents, parties hereto of the first part, and the said insolvent of the second part. Witnesseth that the said parties of the first part who have signed these presents have agreed, and do hereby agree with the said insolvent, for and in consideration of the composition at a dollar rate upon their respective claims upon the estate of the said insolvent as exhibited by the schedule thereof hereto annexed, and upon all other just claims thereon, of forty cents on the dollar of said claims, as follows, that is to say, six, twelve, eighteen, and twenty-four months from the first day of January next, with interest, they the said parties of the first part will discharge the said insolvent of and from all claim and demand whatsoever that they have or can claim against the insolvent to the date hereof, and do hereby agree with the said insol-

vent, that upon receiving the promissory notes of said insolvent as aforesaid, sufficient to pay the composition upon all the said liabilities, then he, the said insolvent, shall be fully and entirely discharged from all such liabilities within the meaning of the said Act and the amendments thereto.

And it is hereby declared that the condition of this deed of composition and discharge, to which the assignee of the estate is hereby required to conform himself, and which he is required to carry out, is that so soon as the said insolvent shall have given the said promissory notes to the said parties of the first part, or deposited the same, together with the notes for such further sums as shall be necessary to pay a like composition upon all other just claims upon the said insolvent's estate which shall hereafter appear to be due by the said insolvent, with the assignee, then and thereupon, and in consideration thereof, and without further delay or charge, the said assignee shall execute a deed of transfer and reconveyance to the said insolvent of all the estate and effects of the said insolvent, both real and personal, of every nature and kind whatever.

Dated at Toronto, &c.

Then followed the names of the persons who executed the deed, and a schedule containing the names of the creditors, and the amounts of their respective claims. And the replication concluded by averring that no other deed was executed in respect of the premises.

The deed contained the names of twenty-eight creditors, whose claims, according to the amounts given in the schedule, amounted to \$4408.50.

The schedule contained the names of these twenty-eight, and also of Mr. Fleming, whose claim was \$636, Mr. Stewart, whose claim was \$290, and Mr. C. McGregor's estate, whose claim was \$350.

These three sums made \$1276, which added to the above \$4408.50 would make the total claims of the thirty-one schedule creditors \$5684.50. The amount of the last mentioned sum which was due by the schedule to creditors whose debts were over \$100, was \$5027.50.

Sixteen persons signed the deed as creditors, but one of these, A. B. McDonald, was not named in the deed or in the schedule as a creditor.

Of the remaining fifteen two were not named in the deed, but were named in the schedule.

Of the remaining thirteen, there were three whose claims were under \$100, and ten only whose claims were \$100 or upwards. The claims of these ten amounted to \$2442.50.

As there were ten creditors whose claims were over \$100, and as there were either nineteen or sixteen who had claims over \$100, the defendant had obtained a majority in number in his favor. But whether the creditors who had signed be taken at ten or twelve, the amount of their claims did not amount to three-fourths in value of the sum of \$5684.50, or even of the \$5027.50 before mentioned.

The defendant demurred to the replication, because it was no answer to the plea; and because it merely set out the deed, and did not either deny or confess and avoid any matter set out in the plea.

The plaintiff joined in demurrer, and gave notice of the following exceptions to the plea :

1. That it did not shew the defendant was a trader under the Act.

2. Nor that an assignee was appointed under the Act; and an assignee was necessary to carry out the provisions of the Act.

3. Nor, if there were an assignee, that he was a party to the deed.

4. Nor that a composition was provided for by the deed, or that any composition was provided for or secured to the plaintiff.

5. Nor that the deed was made or purported to be made between the defendant and all his creditors.

6. Nor that the deed contained or purported to contain any release to the defendant by the plaintiff, or by all the defendant's creditors.

7. Nor has the deed affected or purported to affect the plaintiff's cause of action.

8. Nor that the parties to the deed were creditors within the meaning of the Insolvent Act.

9. Nor, that the deed was executed by the majority in number of those of the creditors who were respectively creditors for sums of \$100 and upwards, and who represented at least three-fourths in value of the liabilities of the insolvent subject to be computed in ascertaining such proportion.

In this Term, *McMichael*, Q. C., for the demurrer, contended that the plea shewed a sufficient discharge under the 94th section of the Insolvent Act of 1869. He referred to *Clapham v. Atkinson*, 4 B. & S. 722.

Rose and George Kerr, Jr., contra. The deed does not shew that it was made for the benefit of all creditors, which it should do: *Martin v. Gribble*, 3 H. & C. 631; S. C. 34 L. J. Ex. 139; *Shaw v. Massie*, 21 C. P. 266; *Walter v. Adcock et al.*, 7 H. & N. 541. The only provision made for the non-assenting creditors, is that the notes to be given to them are to be deposited with the assignee for them. The plea does not shew the defendant to have been a trader, and the Act of 1869 expressly provides, by section one, "This Act shall apply to traders only." The assignee referred to in the plea and in the deed should have been a party to the deed: *Green v. Swan*, 22 C. P. 307; *Bullen & Leake's Prec.*, p. 9. In the allegation of insolvency it is not stated that he became insolvent "within the meaning of the Insolvent Act. The plaintiff's claim is greater in his declaration than defendant has stated in the schedule. The terms of the 94th section of the Act have not been complied with by the defendant. The non-assenting creditors cannot get at the composition provided, for the defendant was not obliged to make the notes. See also *King v. Smith*, 19 C. P. 319.

WILSON, J., delivered the judgment of the Court.

The plea shews the deed of composition and discharge to have been made between the several creditors of the

defendant in the deed mentioned of the first part, and the defendant of the second part.

There are twenty-eight creditors in the deed who are parties of the first part. The schedule shews there are thirty-one creditors named, three of them not being mentioned in the deed.

The three creditors named in the schedule who are not named in the deed, are M. Fleming, whose claim is \$636; William Stewart, whose claim is \$290; and R. C. McGregor's estate, whose claim, though in blank, should, according to the composition, which amounts to \$140 at 40 cents in the dollar, be \$350, making in all \$1,276, not within the terms of the deed. Fleming and Stewart have, however, executed the deed, although not parties to it. McGregor's estate has not executed from anything which the record shows.

The plaintiff is named in the deed and in the schedule, but he is not one of the assenting creditors.

The deed, after describing the twenty-eight creditors, proceeds as follows: "being all the creditors of said insolvent constituting more than the majority in number of those of the creditors of the said insolvent who are respectively creditors of the said insolvent for sums of one hundred dollars and upwards, and representing more than three-fourths in value of their liabilities which are subject to be computed in ascertaining the proportion in number and value of his creditors who have executed these presents, parties hereto of the first part."

If this mean that the twenty-eight are all the creditors of the insolvent, the schedule shews that the statement is not correct.

If it means that the twenty-eight are all the creditors of the insolvent who constitute more than the majority, &c., it is quite plain that all beyond the twenty-eight are expressly excluded from the operation of the deed.

And if the words, "representing more than three-fourths of *their* liabilities, &c.," are to be controlled by the words, "who have executed these presents," they mean what is

very obvious, that the whole of the claims of the parties of the first part is more than the three-fourths of their claims.

It appears from the statement above made, that the defendant has not shewn a deed executed by the majority in number of his creditors who are respectively creditors for \$100 and upwards, *and* who represent at least three-fourths in value of his liabilities subject to be computed in ascertaining such proportion.

It must be assumed from these facts that the deed has not been made with all the creditors of the insolvent, and that it has not been executed by creditors who were parties to it who represented three-fourths in value of the liabilities of the insolvent.

The words, "subject to be computed in ascertaining such proportion," are a restriction in favour of the debtor. They are to prevent those claims which come under the one hundredth section from being reckoned against him in determining whether he is to be discharged from his ordinary liabilities or not.

It would be unfair to allow those special obligations, which cannot be barred by any one but these privileged creditors themselves, to be added to the ordinary liabilities for the purpose of raising the three-fourths value of his debts, which is to entitle him to a discharge from the whole of that ordinary class of debts.

It was contended the plea was insufficient, because it did not shew the defendant was a trader. It was defective in that respect, but the replication has cured that, for it has shewn the deed in full, and by it the defendant is described as a *merchant*, which certainly means a trader.

It was next objected, that it was not shewn an assignee in insolvency had been appointed, and that he was not shewn to have been a party to the deed. The statute does not require the assignee to be a party to the deed. The composition and discharge is an arrangement between the creditors and the debtor alone.

The provision in the 95th section, that the deed may contain instructions to the assignee as to the manner he

is to deal with the estate after the deposit of the deed with him, which instructions he shall obey, indicates rather that the assignee is not a party, and need not be a party, to the deed. And the provision in the 94th section, that the deed may be made before any proceedings in insolvency, leads to the same conclusion.

The plea shews there was an assignee in insolvency at the time the deed was made with the creditors in November, 1871, for it expressly alleges that on the 24th of January, 1871, the defendant made and executed a voluntary assignment under the Act to the said George Stevenson, the official assignee in and for the County of Lambton.

This deed cannot be said to have been made independently of the Insolvent Act, and does not therefore come within the decision referred to in *Green v. Swan*, 22 C. P. 307, which it is not necessary to consider.

The fourth objection is not maintainable in the face of the allegations which disprove it in the plea.

The fifth objection has been already considered, and it is fatal to the plea.

The sixth and seventh objections are not supported.

As to the eighth objection, that it is not shewn the parties to the deed were creditors within the meaning of the Act, it may in many cases, and as a matter of pleading it may in all cases, by reason of the condition and exception being contained in the 94th section itself, be proper to make an averment to that effect.

If the deed is made with *all* the creditors, the ordinary as well as the special creditors under the 100th section, and the proper majority in number and value of the whole body agree to a composition and discharge, (for the special creditors may under the 100th section expressly consent to it), there need be no averment that the creditors consenting are creditors within the Act. The deed is then a valid deed under the statute as against them, and also as against the dissenting minority in number and value, who are not special creditors. But if the whole of that minority should be of that special class, still, as they are yet but a minority,

the *deed* cannot be defeated, although its operation upon them may be of no effect. It cannot be necessary then to aver, as against a plain majority of all the creditors, that the minority represented persons who were creditors within the meaning of the statute.

In this case it was not incumbent on the defendant to aver that the plaintiff was *not* of that special class, for his demand sued for shews *primâ facie* that he is not.

But if a special creditor were suing for a claim which appeared to be one which could not be barred without his express consent, the defendant would require to shew that such express consent had been given. Or, if he were suing for such a claim which might or might not be of that character so far as the declaration shewed, the necessary averment would have to be made by the defendant of such express consent having been given, whenever the nature of the special claim appeared.

The ninth objection is covered by the fifth, and has already been disposed of.

The plaintiff is entitled to judgment on his fifth and ninth objections to the plea, the plea not shewing that the deed was made with all the creditors of the defendant, and the replication to it shewing that the deed was in fact not made with all of the creditors, and that it had not the assent of those who represented the three-fourths value of the liabilities, which was subject to be computed for that purpose.

*Judgment for plaintiff on the 5th and
9th exceptions to the plea, and on
the demurrer to the replication.*

MEMORANDA.

In the vacation preceding this Term the Honorable OLIVER MOWAT was appointed Attorney General for the Province of Ontario, in the place and stead of the Honorable ADAM CROOKS, resigned.

During this Term, the following gentlemen were called to the Bar :

GEORGE DORMER, BEAUFORT HENRY VIDAL, FREDERICK, WILLIAM MONRO, CHARLES CORBOULD, JAMES FLETCHER, JOHN ALEXANDER GEMMELL, WILLIAM ROAF, JOHN AUGUSTUS BARRON, RODERICK STEPHEN ROBLIN, MARTIN MALONE, JOHN ROWE, ALEXANDER FRASER MCINTYRE, JAMES ROBERT STRATHY, ROBERT McMILLAN FLEMING, CHARLES HENRY RITCHIE, GEORGE McNAB, JOHN AKERS, JOHN WHITE, JOHN ANDREW PATERSON, ROBERT SEDGEWICK, NEWMAN WRIGHT HOYLES, JAMES BRUCE SMITHE, THOMAS LANGTON, HUGH JOHN MACDONALD, WILLIAM REDFORD MULOCK, RICHARD JOHN WICKSTEAD.

In the Vacation succeeding this Term,

DANIEL MCMICHAEL, CHRISTOPHER SALMON PATTERSON, EDMUND BURKE WOOD, JOHN T. ANDERSON, THOMAS MOSS, on the 13th December, and ROBERT STUART WOODS, JAMES A. HENDERSON, D.C.L., D'ARCY BOULTON, ALEXANDER LEITH, THOMAS ROBERTSON, HON. JOHN O'CONNOR, HECTOR CAMERON, JAMES BEATY, junior, GEORGE A. DREW, JAMES MACLENNAN, DAVID TISDALE, D'ALTON MCCARTHY, HEWITT BERNARD, on the 18th December, were appointed Her Majesty's Counsel for Ontario by his Excellency the Governor General.

IN Michaelmas Term, 1872, 7th February, the Courts of Queen's Bench and Common Pleas made the following rule:

"IT IS ORDERED, that the following Amendments be made in the Tariff of Fees in the Courts of Queen's Bench and Common Pleas, made by the Judges of the Superior Courts of Common Law, in Michaelmas Term, 1871 :—

1. That the portion of said Tariff that is in the words and figures following,—to wit: "Fee with brief at trial in cases of tort or in ejectment, or in matters of contract, when the sum recovered exceeds \$400,"—be struck out, and that the following be substituted in the place thereof, to wit:—

"FEE WITH BRIEF AT TRIAL."

2. That there be added to the allowance to witnesses in that tariff, after the allowance therein to Barristers and Attorneys, Physicians, and Surgeons, the following :—

"Engineers and Surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem, \$4.00.

"If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each cause only.

"The travelling expenses of witnesses, over ten miles, shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile one way."

(Signed)	WILLIAM B. RICHARDS, C. J.
"	JOHN H. HAGARTY, C.J., C.P.
"	JOSEPH C. MORRISON, J.
"	ADAM WILSON, J.
"	JOHN W. GWYNNE, J.
"	THOMAS GALT, J.

HILARY TERM, 36 VICTORIA, 1873.

(From February 3rd to February 15th.)

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

EAKINS V. GAWLEY ET AL.

Assignment of chose in action.

Defendant agreed with R. to sell and deliver to him a quantity of lumber by a certain day. After that day R., with defendant's assent, assigned the contract and all his interest in it to the plaintiff, and defendant afterwards told the plaintiff's agent they would carry out the contract, and delivered some of the lumber to plaintiff.

Held, the suit being commenced before the 35 Vic. ch. 12, O., that the plaintiff was only the assignee of a chose in action, and could not sue defendants for not delivering the rest of the lumber.

THE declaration set out that the defendants, in writing, agreed with one Robarts to deliver to him a large quantity of lumber of a particular kind, &c., and that Robarts sold and transferred to the plaintiff the said agreement and all benefit and advantage derivable under it, and that the defendant knew and approved of and agreed to the transfer, and partly performed the said agreement, by delivering to the plaintiff a portion of the lumber, and received from the plaintiff money in payment thereof. Breach, that the plaintiff did not deliver the said lumber, whereby, &c.

Pleas, 1. In assumpsit; and 2. That defendants did not make the agreement, as alleged.

The case was tried before Galt, J., at the Spring Assizes, at Sandwich, in 1872.

At the trial an agreement was put in, dated 30th May, 1871, between Robarts of the one part, and the defendants of the other part, by which defendants, for the consideration mentioned, agreed to furnish and deliver to Robarts, within three months from the date, a large quantity of lumber, Robarts to pay therefor \$8 a thousand when inspected, &c.

The plaintiff also put in an assignment under seal from Robarts to himself, dated 4th September, 1871, by which Robarts assigned and transferred, &c., to the plaintiff all his interest, profits, claim, and demand in or to the said contract. This assignment was made after the time limited by the contract for its performance.

Evidence was given to shew that Gawley, one of the defendants, knew of the transfer to plaintiff, and that he delivered to the plaintiff a portion of the lumber; and that one of the defendants stated to plaintiff's agent that he would like that an assignment should be made by Robarts to plaintiff, and that, if made, he would see it fulfilled.

At the close of the plaintiff's case a nonsuit was moved for, on the ground that the only contract shewn was that between Robarts and defendants; that at the time of the assignment the contract had been broken, and all that Robarts then had was a mere right of action, which could not be assigned.

The learned Judge was of that opinion, but he allowed the case to go on, reserving leave to enter a nonsuit.

On the part of the defence, Gawley, one of the defendants, was called. His testimony was to the effect, that after his contract with Robarts, he (Robarts) gave the witness to understand that the lumber was to be delivered to the plaintiff, and that he, plaintiff, was to receive all the lumber they made for Robarts under their agreement; that Robarts paid him \$300 on account; that afterwards he was told of the assignment of the contract, and that he said he would go on with the contract, and did deliver lumber to the plaintiff.

The learned Judge upon this nonsuited the plaintiff,

reserving leave to him to move to enter a verdict for him for \$440, a sum agreed upon, should the Court be of opinion that he was entitled to recover.

In the following term *Prince*, Q.C., accordingly obtained a rule to set aside the nonsuit and enter a verdict, pursuant to leave reserved.

Harrison, Q.C., shewed cause. This is an attempt by the plaintiff to recover as assignee of a chose in action in his own name. The defendants made the contract with Robarts. The plaintiff says Robarts assigned to him, and that the defendants have adopted and assented to the assignment, and partly performed the agreement under it. These facts will not satisfy the cases before the late Act of Ontario, 35 Vic. ch. 12, and that Act is not retrospective. He referred to *Fairlie v. Denton et al.*, 8 B. & C. 395; *Liversidge v. Broadbent*, 4 H. & N. 603; *Cochrane v. Green*, 9 C. B. N. S. 448. Another difficulty in the plaintiff's way is, that the contract is executory, and under the Statute of Frauds should be in writing, and no such contract exists between plaintiff and defendants.

Prince, Q.C. The declaration in effect sets up a new agreement between plaintiff and defendants, and was proved, and the plaintiff should have a verdict on that ground, independently of the question of the assignment of the chose in action.

MORRISON, J., delivered the judgment of the Court.

I am of opinion that the nonsuit was right, and that this rule should be discharged. This action having been commenced before the passing of the Act making choses in action assignable, the former general rule of law must be applied to the case: viz., that a chose in action could not be assigned so as to give the assignee a right to sue for it in his own name.

The assignment here is clearly one of a mere right or chose in action. The defendants' liability was to Robarts, the assignor.

It was contended by Mr. Prince that there was privity in contract between the defendants and plaintiff, by reason of the defendants, after the assignment, acknowledging the contract and delivering lumber under it to the plaintiff.

True, the agreement was acknowledged by the defendants; but it was *their* agreement with Robarts, not with the plaintiff. The fact that the defendants approved of the transfer did not amount to any agreement with the plaintiff to fulfil the unperformed part of the contract made with Robarts.

The declaration is very artfully drawn; but the defendants can only be liable to the plaintiff by reason of some promise or duty arising from contract, and that must be founded on a good consideration moving from the plaintiff.

There is, in fact, no evidence of any contract or consideration, and so this action is not maintainable, and the rule must be discharged.

Rule discharged.

RE NASH AND MCCracken.

Municipal Act of 1866, sec. 296, sub-sec. 23—Power with regard to slaughter houses—By-law void for partiality—Certiorari—Form of rule nisi.

A by-law that "No person shall keep a slaughter-house within the city without the special resolution of the Council:" *Held*, not within the power given to the corporation by the Municipal Act of 1866, sec. 296, sub-sec. 23, to prevent or regulate the erection or continuance of slaughter houses, &c., which may prove to be a nuisance; because it permitted favoritism by the council, and might be exercised in restraint of trade or used to grant a monopoly; and all persons therefore were not placed, or might not be placed, or were liable to be not placed, on the same footing who followed or desired to follow the said trade.

It is improper to call on the Court of General Sessions to shew cause to a rule.

Remarks upon the extreme length of the rule nisi herein.

DURING this term *Richard Martin* obtained a rule, on behalf of Samuel Nash, calling on James Cahill, Police Magistrate of Hamilton, The Court of General Sessions of the Peace for the County of Wentworth, Alexander

Logie, Chairman of the said Court, Joseph Harrison, a Justice of the Peace of the said county, Samuel Black Freeman, Clerk of the Peace of the said county, and James McCracken, the complainant and informer in the matter on which conviction and appeal therefrom were made, and whichever of them this Court might seem fit to direct, to shew cause why a writ or several writs of *certiorari* should not issue out of this Court, directed to said James Cahill, to the said Court of General Sessions of the Peace, and the proper officer thereof, or some one or more of them, or to whomsoever this Court might see fit to direct the same, for the removal into this Court of the record of conviction of the said Samuel Nash, pork-packer, by the said James Cahill, as such Police Magistrate, on the thirteenth day of July last, for the alleged unlawful keeping by the said Nash, on the eleventh of the same month, a slaughter-house at Hamilton aforesaid, without a resolution of the city council of the municipality authorizing the same, contrary to a certain alleged by-law of the city, numbered one, and passed on the 26th of April, 1869; and for the removal also of the record of the order of affirmance in and by the said Court of the said conviction of the said Samuel Nash, and of judgment in that behalf in and by the said Court, all made and delivered in and by the said Court on the thirteenth of December last, upon the appeal of the said Nash; and ordering and adjudging the said Nash to pay the costs of such appeal thereby taxed at \$8.30 to the said Clerk of the Peace, in ten days thereafter; and for the removal of all evidence and proceedings, including the said alleged by-law upon which the conviction, order and judgment were founded; in order that the conviction, order and judgment, or whichever of them this court should see fit, might be quashed, on the following grounds:—

1. Because such alleged by-law is not a by-law preventing or regulating the erection or continuance of any sort of slaughter-houses, and at all events is not exclusively so applied to slaughter-houses which were or might prove

nuisances, but was and is calculated and designed to effect other and entirely different purposes, beyond the jurisdiction of the said municipality professing to pass the same to effect by by-law, and contrary to or unauthorized by the law in that behalf.

2. Because, if valid, such alleged by-law would enable all Municipal Councils of Hamilton, after the passing thereof, by resolution instead of by by-law, and arbitrarily, and in restraint of trade, unreasonably, and to the detriment of the inhabitants of the city, to license and permit any favourites of theirs, and to exclude all others from keeping any sort of slaughter-houses anywhere within the city; and that too, although such slaughter-houses of their favourites so licensed should be the greatest possible nuisance, and in the most objectionable places in the city, and all those refused to be licensed should be entirely free from objection; and therefore such alleged by-law is contrary to and unauthorized by the statutes and laws in that behalf.

3. Because, if such by-law is valid, it does not apply to the keeping by the said Nash of his slaughter-house under the circumstances set forth in the affidavits filed, which is the alleged offence of which he has been convicted.

4. Because the conviction relates exclusively to acts done by Nash in the rightful use of his own private and absolute property, by him acquired and used as he is so convicted of using it long before the passing of the alleged by-law, and thenceforth continually until and at the time of his conviction; or at least to acts done by him in the reasonable and *bonâ fide* assertion of such a right and title so to use his private and absolute property.

5. Because there never was, and is not, any evidence of the commission by Nash of the said alleged offence whereof he was convicted.

And upon grounds disclosed in the affidavits filed.

The summons, which was dated the 11th of July, 1872, stated the complaint to be, that Samuel Nash "did unlawfully keep a slaughter-house at Hamilton, without a reso-

lution of the city council authorizing the same, contrary to a certain by law of such municipality," passed on the 26th day of April, 1869, and intituled by-law No. one.

The conviction, which was dated the 13th of July, 1872, was in the same language. It imposed a fine of \$10 and \$3 for costs, and it adjudged, if the same were not forthwith paid, that the same should be levied by distress and sale of Nash's goods, and in default of a sufficient distress, that Nash should be imprisoned in the common gaol for twenty-one days, and be kept at hard labor, unless the same sums, and all costs and charges, &c., should be sooner paid.

Notice of appeal was given on the 15th of July. The appeal was tried and determined on the 13th of December, 1872. That part of the conviction imposing hard labor was ordered to be struck out of the conviction, and the rest of it was affirmed, and the appeal was dismissed with costs, which were fixed at \$8.30, and which were ordered to be paid to the Clerk of the Peace.

Notice of intention to move for a *certiorari* was given to the parties interested on or soon after the 14th of January, 1873.

The applicant stated in his affidavit that in or about 1863, with the consent of the city council, which however was disputed, he built the slaughter-house complained of, and used it from that time forward as a slaughter-house; and that the land and building had cost him \$10,000: that he maintained, before the Police Magistrate, that the by-law was void, because, in addition to other causes, it did not profess to prevent or regulate the erection or continuance of slaughter-houses.

The By-law was said to be as follows: "By-Law No. 1.—Whereas it is deemed expedient and necessary to amend and consolidate the several by-laws relating to markets. Be it therefore enacted by the corporation of the city of Hamilton; * * 35, that no person shall keep a slaughter-house within the city without the special resolution of the council." Sec. 51 relates to the penalty.

In the affidavits and papers filed, it was stated that on the

11th of March, 1872, a resolution of the city council was passed, authorizing Nash to slaughter hogs within the city under certain restrictions. At the next meeting of the council, on the 25th of March, that resolution was rescinded, and there had been no other resolution of the council on the subject since; and it was shewn there was a similar provision in a by-law of the city at the time when Nash commenced his business in 1863 or thereabout.

McKelcan shewed cause. The by-law is sufficient, and not open to the objections which have been taken to it. Nash was convicted because he continued his slaughter house in defiance of the city authorities. He had no resolution or sanction for carrying on that kind of business. The by-law is not open to the charge of unfairness, as the council have reserved to themselves the right to choose which slaughter houses they will license. It is to be presumed that they will exercise the reserved power properly. They have power under the statute to prohibit the erection of slaughter houses altogether. This by-law is, therefore, within their powers, and should not be interfered with. He referred to *Paley* on Convictions, 4th ed., 330; *Re Watts*, 5 P. R. 267.

R. Martin supported the rule. The party aggrieved is entitled to more consideration than the informer: *Rex v. The Justices of Surrey*, L. R. 5 Q. B. 466. Assuming the by-law to be valid, Nash was *prima facie* perhaps acting in breach of it. The circumstances, however, under which he did act, showed he was not violating it. He commenced his business in 1863 with the consent of the council, and laid out large sums of money upon his buildings and premises to adapt them to his particular trade; and he carried it on from that time until the month of March, 1872, without ever being questioned or interfered with. In March he applied for the leave of the council, "to cure and slaughter, the same as he had enjoyed for the last ten years." He got it, and in two weeks after the resolution of license was revoked, and in July afterwards he was complained of.

But the by-law is void. It does not either regulate or prevent the keeping of a slaughter house. It is not of a general character, so that it shall apply to all alike. It is a power reserved to the council, by which they may be able to sanction one person and refuse another, at their mere will and caprice, to carry on that trade. The by-law should be of that uniform and general character, especially where trade is concerned, that all persons may have and exercise the same rights, and there should be no room or opportunity left for monopolies or favouritism. Nothing is plainer than that under the by-law the council may pass a resolution in favor of one person, and may refuse to pass one in favor of another person. That is not within the reasonable and lawful exercise of their powers. He referred to the following authorities : Municipal Act, 1866, ch. 51, sec. 296, sub-sec. 23 ; *The Queen v. Cridland et al.*, 7 E. & B. 853 ; *Regina v. Taylor*, 8 U. C. R. 257 ; *Everett v. Grapes*, 3 L. T. N. S. 669 ; *Moon v. Durden*, 2 Ex. 22 ; *Brown et al. v. The Local Board of Health of Holyhead*, 1 H. & C. 601 ; *Young v. Edwards*, 33 L. J. Mag. Cas. 227 ; *Kirk v. Nowill et al.*, 1 T. R. 118 ; *The King v. The Wardens of the Coopers' Company of Newcastle-upon-Tyne*, 7 T. R. 543 ; *Clark v. LeCren*, 9 B. & C. 52 ; *The Chamberlain of London v. Compton*, 7 D. & R. 597 ; *Davies v. Morgan*, 1 Cr. & J. 587, per Bayley, J., at pp. 595, 597 ; *Ellwood v. Bullock*, 6 Q. B. 402, per Coleridge, J. ; *The Queen v. Wood*, 5 E. & B. 49 ; *Waite v. The Local Board of Health of Garston*, 37 L. J. Mag. Cas. 19 ; S. C. L. R. 3 Q. B. 5 ; *Re Penny v. South Eastern Railway Company*, 7 E. & B. 660 ; *Slee et al. v. The Mayor, &c., of Bradford, Yorkshire*, 9 Jur. N. S. 815, 820.

WILSON, J., delivered the judgment of the Court.

The provision in the Municipal Act applicable to this case is that which is contained in the Act of 1866, sec. 296, sub-sec. 23, "For preventing or regulating the erection or continuance of slaughter houses, gas works, tanneries, dis-

tilleries, or other manufactories or trades which may prove to be a nuisance."

A by-law, that no person shall exercise the art of a painter within the city of London, not being free of the company of painters, is a by-law in restraint of trade, and void, unless there is a special custom to warrant it: *Clark v. Le Cren*, 9 B. & C. 52; *The Chamberlain of London v. Compton*, 7 D. & R. 597; *Shaw v. Pope*, 2 B. & Ad. 465; and many other cases to the same effect in *Grant on Corporations* 92.

A by-law, that no butcher or other person should, within the walls of the city of Exeter, slaughter any beast, upon pain to forfeit, &c., was held not to be in restraint of trade, but only a regulation of it, and to be reasonable: *Pierce v. Bartrum*, Cowp. 269.

If this by-law had been, that every person who had a slaughter house in the city should get his name registered with the city clerk, and should be entitled to a license to carry on his business, provided he did so in a particular locality which was specially assigned for all persons in that trade, no objection could be taken to it; for it would hinder no one from setting up and following that trade, and the registration of name, license, and particular area to which the business was restricted, would be deemed merely regulations of police.

But it is said the by-law is not in that form; that it does not permit, as the other would have permitted, any one to set up his slaughter house subject to some reasonable regulations. But while the by-law is not prohibitory altogether, it gives the power to the council to make it prohibitory as to one person and permissive as to another; that the enactment that, "No person shall keep a slaughter house within the city," is a prohibition against every one; and that the remaining part of the enactment, "without the special resolution of the council" still excludes every one, so far as it depends on the choice or efforts of those desirous of establishing such a business, from establishing it, and confers the power upon the council of saying who shall not follow that trade within the city.

If that be the meaning and purport of the by-law it will be objectionable, because it may be exercised in restraint of trade, and may be used to grant a monopoly, contrary to section 220 of the Act.

The council may *limit* the number of shop and tavern licenses, victualling houses, &c., and the council may license the keeping of billiard tables kept for gain, and the owners of cabs, &c., used for hire, and the council may license auctioneers, hawkers, and pedlars, and intelligence offices; but it cannot limit the number of persons who shall keep billiard tables for hire, &c., the same as it can limit the persons to whom shop and tavern licenses shall be granted.

In *Everett v. Grapes*, 3 L. T. N. S. 669, a by-law was held bad for imposing a fine upon any person. "who shall keep or suffer to be kept any swine within the said borough from the 1st of May to the 31st of October inclusive in any year," because the by-law was not for regulation merely, but was in restraint of trade, and was made in excess of authority, as the statute permitted the power to be exercised for the prevention of all such nuisances as were not already punishable in a summary manner by virtue of any act in force in the borough, whereas the by-law prohibited absolutely the keeping of swine, whether they were kept in such a manner as to be a nuisance or not.

Crompton, J., said, "By-laws of this kind always have the qualification so as to be a nuisance."

Wightman, J., said, "Here the by-law is generally against the keeping of pigs." The by-law was therefore held to be bad.

It may be that while the council does not altogether prevent the keeping of slaughter houses in the city, they will not refuse to pass a resolution in favor of any one who applies for leave, and conforms to all such reasonable rules which may be passed for the purposes of regulating them, and that they will not exercise their powers with partiality or favouritism.

But so long as they may do so, all persons are not placed, or may not be placed, or are liable to be not placed, on the same footing, who follow or desire to follow that trade.

The by-law is fairly open to that objection, and cannot therefore be justified.

The conviction must fall with it.

The rule will be absolute for the writ of *certiorari* to go to the Chairman of the General Sessions of the Peace, and to the Clerk of the Peace as well, if the applicant thinks there is any doubt on the point.

We observe the Court of General Sessions of the Peace has been called upon to shew cause. Such a direction was improper. A *Court* is never called on to shew cause or to do any act.

The rule is also in other respects worded in an unusual manner.

In substance the applicant has succeeded upon it, and it is unnecessary to say more respecting it, excepting that it might have been very fully [expressed] in one-half of its ten folios.

We refer to the case of *Pirie and the Town of Dundas*, 29 U. C. R. 401, as bearing on by-laws of this nature.

Rule absolute.

DINGMAN V. AUSTIN.

Married women's Property Act, 1872—Construction of, as to real property.

Sec. 1 of 35 Vic., ch. 16, so far as regards "The real estate of any married woman which is owned by her at the time of her marriage," applies only to marriages which take place after the passing of the Act. When, therefore, the plaintiff, who married in 1851, had lived upon the land in question, which was his wife's property, from 1852 until 1861, and had then joined with his wife in a lease to defendant for ten years: *Held*, that on the expiration of such lease the plaintiff alone might maintain ejectment.

EJECTMENT for sixty-four acres of lot 2 in the first concession of East Whitby, in the County of Ontario, particularly described, reserving thereout certain parts of the lot described; also for a small piece of land twenty chains long and one chain wide, conveyed by the corporation of Whitby to Samuel Dingman by deed dated 4th of November, 1861, and described by metes and bounds.

The action was commenced on the 3rd April, 1872.

The defendant appeared and limited his defence to the sixty-four acres with the exceptions thereout.

The plaintiff claimed this portion by his marriage with Elizabeth Dingman, formerly Elizabeth Stephens, daughter of James Stephens.

The defendant claimed title as tenant to Elizabeth Dingman, wife of the plaintiff, the defendant having paid and continuing to pay rent to Elizabeth Dingman.

At the trial before Galt, J., at Whitby, the plaintiff was called, who stated that the land in dispute was the east-half of lot two in the first concession of East Whitby. He was first in possession of the land in 1852; was married in 1851. The land was his wife's. He was farming it; he continued to live on it until the fall of 1861. In 1861 a lease was made to defendant, to hold for ten years from the first of April, 1862. On cross-examination he said there was a tavern on the premises. He got half the rent from the defendant and his wife the other half. They were living separate, and did not then live together. Defendant had been in possession since the lease expired. The lease put in from

Samuel Dingman and Elizabeth Dingman to Edward Austin and Frederick Golding of the premises, was dated 23rd September, 1861, to hold for ten years from 1st April, 1862.

A demand of possession was put in and was admitted. *R. Loscombe*, for the defendant, objected that under 35 Victoria, ch. 16, O., the plaintiff could not sue, or at all events could not sue alone.

The learned Judge nonsuited the plaintiff, reserving leave to move to enter a verdict in his favor.

In Michaelmas Term *C. S. Patterson*, Q. C., obtained a rule *nisi* to enter a verdict for the plaintiff, pursuant to leave reserved, on the ground that the plaintiff was entitled to the possession of the lands in question, and that the Married Women's Property Act of 1872 did not apply to deprive him of that right.

During the same term *Loscombe* shewed cause. The Statute of Ontario, 35 Vic., ch. 16, was assented to the 2nd March, 1872, and the lease under which defendant held the premises expired on the 1st of April, 1872. The wife has authorized the tenant to continue in possession, and if she were *sole*, that would prevent ejectment lying against him by the plaintiff, as the plaintiff's right to the premises under the statute has either expired, or has been transferred to his wife as a *feme sole* by the statute. The first section of Act vests it in the wife.

C. S. Patterson, Q. C., contra. The plaintiff was married to his wife before the passing of 22 Vic., ch. 34, (4th of May, 1859), and had taken possession of and resided on the land in question. The Act of 1859 specially excepted persons situated as he was from the operation of that Act. The Legislature of Ontario could not intend to affect property when parties had acquired a vested interest as the plaintiff had. According to the evidence he went into possession of the property in 1852, twenty years before the passing of that Act. The Interpretation Act, of Ontario, 31 Vic., ch. 1, sec. 6, sub-sec. 1, shew that the first section of the Act being in the present tense,

it is to be applied to the circumstances as they arise. It will not deprive a person of property unless specially so enacted. Here the section applies to the real estate of a married woman which *is* owned by her at the time of her marriage, not to such estate as *was* owned by her at the time of her marriage. Unless this view be taken, the husband would not be relieved from the wife's debts, though he might be deprived of any property of hers to pay them. Under section 8 of the Act of last session, the husband is only freed from his wife's debts when the marriage takes place after the Act comes in force. Under section 15 of Consol. Stat. U. C., ch. 73, when married since 4th May, 1859, the husband was liable to the value of the interest he took in the wife's property for her debts. He might in fact have exhausted the value of that property in payment of her debts; yet if the real estate remained, in the view now pressed it could be taken away from him by the wife, and the rents applied as she might think proper.

RICHARDS, C. J., delivered the judgment of the Court.

There can be no doubt, that the property in question having been taken possession of by the plaintiff, before the 4th May, 1859, he having been married several years before the Statute 22 Vic. ch. 34, was passed, was not brought within the operation of that statute, and the marital rights of the husband, as to his disposition of that property, remained as they were prior to the passing of the Act of 1859, viz., substantially as they were at common law.

He took a freehold interest in those lands belonging to his wife, during the joint lives of himself and wife, and such interest would pass by his deed alone: *Robertson et al. v. Norris*, 11 Q. B. 916.

The plaintiff, it is said, has lost his estate in these lands.

Apparently he has done no act to forfeit it; but it is said the Legislature has taken it away from him by an Act passed on the 2nd March, 1872, and after he had been legally possessed of this estate for nearly twenty years.

The only section of the Act of 1872 which deprives him of this property, is the first, and it is in these words:—
“After the passing of this Act, the real estate of any married woman which *is* owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues, and profits thereof respectively, shall, without prejudice, and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her life time, or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues and profits;* and any married woman shall be liable on any contract made by her respecting her real estate, as if she was a *feme sole*.”

The fair reading of the section, seems to me to apply to marriages which take place after the passing of the Act; for it does not say the real estate of the married woman which was or may be owned by her at the time of her marriage, or acquired in any manner during coverture, shall be held by her, but only *is* owned: that is, speaking of something that is to take place after the passing of the Act. I take it to be a well established rule that no strained construction will be put on an Act of Parliament to deprive a man of his estate. This section of the Act can have its full force, and all the clauses of the statute be fully operative, by limiting this first section, especially down as far as the asterisk* to marriages that take place after the passing of the Statute.

I think this is the natural, reasonable, and just view to take of the section from its very words.

I have seen the elaborate judgment of Mr. Justice Gwynne, in the case in the County Court of the County of York, tried before me, which came before the Common Pleas. It may be inferred that the majority of the Judges of that Court entertain a different view as to the effect of the first section of the Statute from that which I have expressed. It is not necessary, as I understand the case of *Merrick et al. v. Sherwood*, 22 C. P. 467, to sustain the

verdict in that case that the Court should be of opinion that the first section of the statute was not confined to marriages which might take place after the passage of the Act. Chief Justice Hagarty dissented from that judgment on the points necessary to be decided for sustaining the plaintiff's action, and I infer that he entertained the view above expressed, as to the first section of the statute being limited to marriages which might take place after the passing of the Act.

We think the rule should be absolute to enter a verdict for the plaintiff.

It may be as well to note here, that if under a mere settlement for the benefit of the wife, the rents to be received to her own separate use the legal estate were in the husband, in an action brought by the husband against a tenant of the wife for trespass and assault, in preventing him going on the land, the tenant, by way of equitable defence, might shew that he was in under the wife. That would defeat the husband's action: *Allen v. Walker*, L. R. 5 Ex. 187.

Rule absolute.

MCGUNIGAL V. GRAND TRUNK RAILWAY CO.

Action against R. W. Co—Mistaken sympathy of jury—New trial.

In an action against a railway company for killing the plaintiff's horses by collision at a crossing, the weight of evidence went strongly to shew that the plaintiff was intoxicated, and the accident caused by his own negligence and bad driving. The jury, however, found in his favor. The Judge who tried the cause being dissatisfied with the verdict, and there being reason to believe that it arose from mistaken sympathy on the part of the jury for a poor man as against a railway company, the Court granted a new trial with costs to abide the event.

ACTION for damages for killing the plaintiff's horses and injuring his sleigh, by collision with defendant's trains, the horses having escaped from the plaintiff's control while driving them through a public street in St. Mary's, and having got on to defendants' track, as the plaintiff alleged,

through the negligent construction and defective state of the cattle guards of defendants' railway.

The case was tried before Gwynne, J., at Stratford, at the Fall Assizes of 1872.

The evidence was contradictory, and the nature of it sufficiently appears from the judgment. There was strong evidence to shew that the horses escaped owing to the intoxicated state of the plaintiff, who was driving them.

A nonsuit, on grounds not material to this report, was moved for at the end of the plaintiff's case and renewed at the close of the case, but the learned Judge declined to nonsuit. The charge of the learned Judge was favourable to the defendants, and he directed the jury "lastly, that they should only find for the plaintiff if they found the loss to be attributable to the defective state of the guard, wholly and solely, without any default of the plaintiff."

The jury, however, found for the plaintiff, and \$200 damages

In Easter Term last, *McMichael*, Q.C., obtained a rule *nisi* to set aside the verdict, and for a new trial on the ground that the verdict was contrary to law and evidence, and for misdirection of the learned Judge, in ruling that there was evidence to go to the jury of defendants' liability, although the horses were on the highway; and in ruling that the plaintiff was not prevented from recovering Consol. Stat Can. ch. 66, secs. 147-9 unless the horses escaped or ran away from him by his negligence, and that it was not a sufficient defence that the horses were at large at the point of intersection, and not under the charge of any person, without also showing affirmatively that the horses escaped by the negligence or default of the plaintiff; and on the ground that there was sufficient evidence that the plaintiff by his default permitted the horses to be at large.

This rule was enlarged to Michaelmas Term, when *English* shewed cause. The question of negligence was for the jury. It was left to them with a charge certainly not too favourable to the plaintiff, and their finding ought

to prevail. The Court will not disturb such a verdict as this found upon contradictory evidence. As to negligence, he cited *Ferris v. Great Western Railway*, 16 U. C. R. 474; *Thompson v. Grand Trunk Railway*, 18 U. C. R. 92; *Cooley v. Grand Trunk Railway*, 18 U. C. R. 96; *Markham v. Great Western Railway*, 25 U. C. R. 572.

McMichael, Q. C., contra. *Cooley v. Grand Trunk Railway*, 18 U. C. R. 96, shews that the state of the cattle guards can make no difference, when the accident was caused by the negligence of the plaintiff himself, particularly when the horses were not in charge of any person. The plaintiff was intoxicated, and did not take proper care in the management of his horses, and they ran away from his own negligence, and this caused the accident. The constable who saw him as he was leaving the town, would have arrested him for driving immoderately, if he could have caught him. There ought to be a new trial in any view.

RICHARDS, C. J., delivered the judgment of the Court.

The witness who was in the sleigh with the plaintiff, when the horses were yet apparently under the plaintiff's control if he had acted prudently, and who leaped from the sleigh after the horses started off to run, and when they had become uncontrollable, gave strong evidence to sustain the view that the plaintiff did not, either from being intoxicated or indisposition from some other unexpected cause, act prudently in the management of his horses, otherwise he could have prevented their running away.

Another person, who jumped on the sleigh and leaped off afterwards, because the horses were going so fast, said the plaintiff did not seem to care how the team went, "lines slack, not tight: don't think any man would drive that way if he was sober."

Now these two witnesses were on the sleigh just before the horses ran away, and had a better opportunity of knowing how they were driven, and how the plaintiff conducted himself at the very time when he should have been careful, than any of the other witnesses.

The constable spoke of the horses being driven as fast as they could go ; they had their swing to go as they liked ; the lines were slack.

Another witness spoke of the plaintiff being intoxicated, and seeing him as he drove along sitting on the side of the sleigh, and calling " whoa," " whoa," in a way more likely to make the horses go fast.

The plaintiff's dog apparently caused the horses to run, perhaps excited by the way his master cried out to them, and he, sitting with his side to the horses on the rail of the sleigh, driving with a loose rein, would be very likely be thrown off the sleigh if it struck against anything ; and he says, in own evidence, he was thrown off on the right side. In another part of his evidence he said, " I was jostled off, could not say how far, was a little stunned, also excited. I understand a man got up on the sleigh before I was thrown off: Don't know that myself."

I think the evidence largely preponderates in favour of the defendants, and under the same kind of evidence between two parties who would come before the jury on equal terms, I cannot doubt that a verdict would at once be rendered for the defendant. But between a poor man and a railway company, the same consideration is not always given to evidence that bears in favor of the defendants, and Courts are bound to use their power to prevent, if they can, what they conceive to be an injustice, arising perhaps from mistaken sympathy on the part of a jury. We have consulted the learned Judge who tried the cause, and he entertains as strong an opinion on the subject as we do.

The rule for a new trial will, therefore, be absolute, costs to abide the event.

Rule absolute for new trial.

MCLEAN V. GREAT WESTERN RAILWAY CO.

Land for railway purposes—Payment to one not owner—Right of true owner to compensation or ejectment—16 Vic., ch. 99, sec. 7.

While the plaintiff, the true owner of the land in question, was absent in Australia, the Hamilton and Toronto Railway Company (subsequently amalgamated with defendants) agreed to purchase the land for the purposes of their railway—without arbitration—from the plaintiff's brother, believing him to be, as he professed to be, the owner, and paid him the full value therefor, and was by him let into possession. *Held*, that the plaintiff could not maintain ejectment for the land, but must look to defendants for compensation under the statutes.

EJECTMENT, for parts of lots 39 and 40 in the first or broken front concession west of Yonge Street, in York, containing three acres and seven one-hundredths of an acre.

The plaintiff claimed as heir-at-law of Margaret McLean, the patentee of the Crown.

The defendants denied the plaintiff's title and claimed, title in themselves under a deed of amalgamation between them and the Hamilton and Toronto Railway Company, which company had selected the land in the exercise of their powers, for the purposes, uses, and conveniences of their railway.

The cause was tried at the last fall assizes at Toronto, before *Hagarty*, C. J., C. P., without a jury, and a verdict entered for the plaintiff.

It appeared that the defendants dealt with James McLean, brother of the plaintiff, the plaintiff being absent in Australia, as the true owner, and paid him, James, the full value of the land, they believing him to be such true owner, as in fact he represented himself to be, and were by James let into possession. It appeared also that John was the true owner, and that no arbitration had taken place, and no money been paid into Court.

In Michaelmas term last *McMichael*, Q.C., obtained a rule, calling on the plaintiff to shew cause why the verdict should not be set aside, and for a new trial, on the ground

that it was contrary to law and evidence, the plaintiff having no right to maintain this action, his remedy being for compensation only, under the statutes in that behalf.

In Easter Term last *Harrison*, Q. C., shewed cause. The statutes in question are 4 Wm. IV., ch. 29, sec. 3, which must be read in connection with sec. 5, and 16 Vic. ch. 99. James McLean, who gave the land to the company, and who dealt with them as the owner, was not the owner; he was an occupier only. The statutes do not enable him to dispose of the land to the prejudice of the owner. The company could have acquired a good title to the land if they had pursued the provisions of the statute. They did not do so, and until they do so, they can assert no title as against the owner. This is not a case in which the defendants are at liberty to keep the land and to drive the owner to a reference for compensation. They never had a rightful possession. But, as a fact the plaintiff does not wish to disturb the possession of the defendants. He is willing to arbitrate for a compensation; but the defendants refuse to arbitrate, and the plaintiff is obliged to use such means as will bring them to terms. The point has been often discussed, and it will only be necessary to refer to the authorities upon it:—*Johnson v. Ontario, Simcoe, and Huron Railway Co.*, 11 U. C. R. 246; *Douglas v. London and N. W. Railway Co.*, 3 K. & J. 173; *Doe d. Hutchinson v. Manchester, Bury, and Rossendale Railway Co.*, 14 M. & W. 687; *Walker v. Ware, Hadham & Buntingford Railway Co.*, L. R. 1 Eq. 195; *Raphael v. Thames Valley Railway Co.*, L. R. 2 Ch. App. 147; *Wing v. Tottenham and Hampstead Junction Railway Co.*, L. R. 3 Ch. App. 744; *Earl St. Germans v. Crystal Palace Railway Co.*, L. R. 11 Eq. 568; *Lycett v. Stafford and Uttoxeter Railway Co.*, L. R. 13 Eq. 261; *Stretton v. Great Western and Brentford Railway Co.*, L. R. 5 Ch. App. 751; *Stoneham v. London and Brighton Railway Co.*, L. R. 7 Q. B. 1; *Jannette v. Great Western Railway Co.*, 4 C. P. 488; *Rankin v. Great Western*

Railway Co., 4 C. P. 463; *Corporation of the County of Welland v. Buffalo and Lake Huron Railway Co.*, (In Appeal), 31 U. C. R. 539; *Smalley v. Blackburn Railway Co.*, 2 H. & N. 158; *Marquis of Salisbury v. The Great Western Railway Co.*, 7 Rail. Ca. 175.

McMichael, Q. C., supported the rule. It is contended that as the railway title was obtained from the person in possession, the defendants have a good statutable title. They paid the full value for the land. At any rate ejectment cannot be maintained against them: 16 Vic. ch. 99; *Corporation of the County of Welland v. Buffalo and Lake Huron Railway Co. et al.*, 30 U. C. 147; *Galt v. Erie and Niagara Railway Co. et al.*, 19 C. P. 357; *Cotton v. Hamilton and Toronto Railway Co.*, 14 U. C. R. 87.

MORRISON, J.—It is, I think, quite clear that the Legislature intended that this Company were entitled to have and take for the purposes and use of their railway, any land required and necessary for the construction of the railway, without the consent of the owner, making provision for compensation being made to the owner, either by an amount to be agreed upon between the owner or occupier and the Company, or, if they could not agree, then by means of an award of arbitrators as provided by the Act; and in order to protect the true owner, in cases where the Company might pay compensation to a person not entitled to receive it, the Statute provided [that the Company should still be responsible to the true owner.

That being the case, is there anything in the statutes incorporating or affecting these defendants, or rather the Hamilton and Toronto Railway Company, which prevented or forbade the Company taking possession of any land for the construction of the railway; or was the Company prevented from entering upon such lands when the owner was not in occupation, or where there was an occupier not the owner, and with the consent of the latter? I think not.

The 6th sec. of 16 Vic. ch. 99, refers to and implies a taking possession of the required land without any agreement being had or made between the owner or occupier

of the land and the Company; and the section makes provision, where the taking of possession is resisted, after making a tender, by a very summary mode to obtain possession.

And I may here remark, that the amount to be tendered is not in any way limited, so that by a tender of a very small amount the Company were entitled to summarily eject the owner or occupier.

I see no provision preventing the Company taking possession when they are not forcibly prevented from doing so, or for making them trespassers, or liable to be ejected, should they take any such land before compensation was made to the owner.

All the enactments point only to one conclusion, that the Company are entitled to have the land without, and against, the consent of the owner; but subject to compensation being made to such owner as provided by the statutes, should parties not agree upon the amount; and the statute further provides, as before stated, that should the Company make compensation to an occupier, not the person entitled to compensation, the Company is nevertheless responsible to the true owner, when he asserts his rights.

On the whole, I concur in the conclusion my learned brother has arrived at, and that our judgment should be in favor of the defendant, and that the rule for a new trial should be made absolute.

WILSON, J.—By the 4 Wm. IV. ch. 29, secs. 3 and 4, as read in connection with sec. 11, do not give the Company the power to take the land of any one, without the permission of the owner first had, or without the authority of a reference under the statute.

The 9 Vic., ch. 81, does not clearly authorize any different mode of procedure, although the 30th section does speak of any land which “*shall be set out and taken as aforesaid*” by the said Company.”

The 16 Vic., ch. 99, sec. 5, uses the like language as the 4 Wm. IV., ch. 29, in relation to the Company dealing with

the owner or occupier, and it refers to all land before then taken by the Company, or thereafter to be taken.

By section 6, after tender or payment of money into Court, the Company may take immediate possession.

By section 7, when the sum has been agreed upon, or has been settled by arbitration, for any land taken by the Company, which might be taken by them without the consent of the proprietor, the sum so agreed upon or awarded shall be the compensation to be paid by them for the land, and shall stand in the stead of the land, and any claim to the land shall, as against the Company, be converted into a claim to the compensation, and the Company shall be responsible whenever they shall have paid such compensation to a party who is not entitled to the same.

The effect of this last statute is, that the Company shall not take possession till after tender of the money to the owner or occupier, or in case of refusal of tender, till after payment of it into Court.

And if the Company deal with the occupier and get possession from him, with his assent, they may hold such land ; but they shall be responsible to the party entitled to it for the compensation which they are liable to pay for it, and which compensation is to stand in stead of the land, so that the claim upon the land is to be a claim upon the compensation.

By this Act the Company is still liable to the true owner, notwithstanding they may have paid the compensation to a person who was not entitled to it, which seems to correspond with the 24 Vic., ch. 17, sec. 2, which declares, that no railway company shall be responsible for the disposition of any purchase money, if paid to the owner of the land, or into Court for his benefit.

Upon a consideration of the whole of the different statutes, I think the proper conclusion to be drawn is, that this plaintiff cannot disturb the Company in their possession of the land ; but that he is driven to look to them for compensation for the land which they have taken, and of which he apparently is the true owner, although they have

paid the full value of it already, to the brother of the plaintiff under the belief that he was the owner, as he claimed and represented himself to be, the plaintiff then and still being absent in Australia.

I had formed a different opinion until I had examined the numerous statutes relating to the Company with more care, in the collection of their statutes which has been made in a small volume lately completed.

Rule absolute.

WILLIAM MCGIVERIN V. THOMAS JAMES AND JOSEPH SMITH.

C. L. P. Act, sec. 44—Service on British subject in England—Contract in Ontario.

L., residing at Montreal, agent of defendants residing in Liverpool, telegraphed and wrote to the plaintiffs at Hamilton, soliciting orders for boiler plate, to be filled by defendants, specifying the quality and terms to be delivered f. o. b. at Liverpool. Plaintiff wrote on receipt to L. at Montreal, enclosing an order for a certain quantity, to which L. answered next day that the order would go forward by next mail.

Held, that the letters and telegrams, more fully set out in the case, constituted a contract.

Held, also, that such contract was made in Ontario, at Hamilton, and following *Cherry v. Thompson*, L. R. 7 Q. B., that under sec. 44 of the C. L. P. Act the plaintiff might serve the defendants residing in England with process, and sue them in our Courts, although the breach occurred in England.

ON the 5th of February, 1872, the plaintiff caused to be issued out of this Court a writ of summons in the form mentioned as intended for service on a British subject out of the jurisdiction, addressed to the defendants, of the city of Liverpool, England, commanding them that within twenty-one days after service they should cause an appearance to be entered in this Court.

The writ was served on both the defendants personally on the 2nd of March, 1872, at the city of Liverpool.

On the 3rd of June the plaintiff made an affidavit that the defendants were British subjects, resident at Liverpool, in England, and he was a British subject resident in the

Province of Ontario; and that the contracts, for the breach of which the action was brought, were made within the Province of Ontario. He referred to the contracts as being in writing, and stated their effect, and the breach by the defendants, and his damage in consequence.

On this affidavit the plaintiff applied for leave to proceed, which was granted by Mr. Dalton, Clerk of the Crown and Pleas of this Court. The order, dated the 4th of June, 1872, directed how the declaration and other papers should be served, and was in the usual form.

No appearance was entered for defendants, and no declaration filed or served up to the 15th of August.

On the 16th of August, Hagarty, C. J. C. P., made an order staying proceedings until the sixth day of Michaelmas Term, to enable the defendants to apply to the Court to set aside the proceedings, and he enlarged the summons to that day, in order that the full Court might dispose of the application, as he considered it one that should be dealt with by the full Court.

On the second day of Michaelmas Term *Burton*, Q. C., obtained a rule *nisi* to set aside the writ of summons, copy, and service, or some one or all of them, with costs, on the ground that the writ was for service on British subjects out of this Province, and was served out of this Province, and there was no cause of action which arose within the jurisdiction of this Court, nor any breach of a contract which was made in this Province in respect of which the writ was issued: that the plaintiff's proceedings herein were unauthorized by law: that the affidavit and papers, on which the order was granted, incorrectly and untruly alleged that the contracts for the alleged breach of which the action was commenced were made within the Province; or why the order of Mr. Dalton made in the cause, *ex parte*, on the 4th of June, allowing the plaintiff to proceed by serving a declaration herein, and all subsequent proceedings should not be set aside on the like grounds; or for such other order as to the Court might seem proper.

From the affidavits and papers filed it appeared that the

facts in relation to this alleged contract were as follows:—Alexander C. Lester, residing at Montreal in the Province of Quebec, was the agent of the defendants, who resided at Liverpool in England, and were either manufacturers of boiler plate or were engaged in the business of selling that article. Lester was defendants' agent to solicit orders from persons engaged in the trade for the boiler plates which the defendants were selling. The plaintiff carried on business as a dealer in hardware at Hamilton, Ontario, under the name of W. McGiverin & Co., and on the 22nd of July, 1871, Lester, by telegram of that date, solicited orders from the plaintiff to be answered and fulfilled by defendants.

The copies of the telegraph and letters in relation to it which were annexed to the affidavit of plaintiff's book-keeper, were as follows:

“*Hamilton, July 22nd, 1871.*”

“*By Telegraph from Montreal.*

To W. MCGIVERIN & Co.

“R. H. nine (9) five 5.

“T. W. nine (9) ten 10.

“F. O. B., both best, four months.

“A. C. LESTER.”

“*Montreal, July 22nd, 1871.*”

“MESSRS. MCGIVERIN & Co.,

“GENTLEMEN,—In case my telegram, quoting B. plate, is not clear I repeat it here:

“R. H. ♂ Best£9 5 0.

“T. W. ♂ Best 9 10 0.

“F. O. B. 4 months. No comm.

“The first I have sold to a house here that has found it to give every satisfaction. I got a third order for it next week. The £9 10s. plate is quite as well finished, and, I believe, of as good quality as Thorneycroft. If you wanted a plate simply for tank or tenders, or bridge work, I could name £9, but this I would not guarantee, as last advices indicated so great activity in plates the present rates can hardly continue.

“Yours truly,

“A. C. LESTER.”

On the 24th of July the plaintiff sent the following letter :—

“ *Hamilton, 24th July, 1871.*”

“ MR. A. C. LESTER, Montreal.

“ DEAR SIR,—Your telegram of yesterday, and also letter of same, are to hand, and we now beg to hand you our orders for 170 boiler plates, R. H. ♂ Best C. £9 5 0, f. o. b. No comm., 4 months, and trust you will impress upon your friends the necessity of early shipment, also securing of as low rates of freight as possible.

“ We remain, yours truly,

“ WM. MCGIVERIN & Co.”

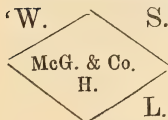
The order was as follows :—

“ Order to Messrs. Thomas James & Co., London, for boiler plates, to be shipped by first-class sailing vessel to our order, care of Messrs. Ireland, Coquitale & Co., (to whom send duplicate invoice and B./L.) marked as per margin, for our account and risk. We insure here.

“ (Signed) WM MCGIVERIN & Co.

“ *Hamilton, 24th July, 1872.*”

‘ W. S. “ 20 R. H. ♂ Best boiler plates 6 x 3 ¼.



“ 170 plates. Each plate to be stamped.

L. “ Price £9 5 0, f. o. b. 4 months, no com.

On the 25th Mr. Lester wrote to plaintiffs :—

“ I have yours of yesterday, with order for B. plate, which will go forward by next mail. This morning reports a rise in iron from 5/0 to 7/6 per ton. Feeling here is to stop at once selling at present prices.”

There were other contracts between the parties said to have been made in the same way.

During this Term *R. Martin* shewed cause. The writ and service can be moved against only at most as irregular, and in that view defendants were too late in moving. Mr. Dalton's order was made on the 4th of June, and the application to the Judge to set it aside was not made until the 8th of July : *Hutton. v. Whitehouse*, 1 H. & N. 32. Defendants should have come within a reasonable time to move against the order. Mr. Bruce, the defend-

ants' attorney, knew of the order on the day after it was granted, and got copies of the affidavits on which it was moved : *Ross v. Gondell*, 7 C. B. 766.

The writ is regular, being issued under the 43rd section of the C. L. P. Act, and is in proper form : *Forbes et al. v. Smith*, 10 Ex. 717, per *Parke, B.*, at p. 721 ; *Staniforth v. Richmond*, 13 W. R. 724.

The plaintiff proceeds in this action on a contract made in Ontario. *Harrison's* C. L. P. Act, p. 42, shews that it is not necessary to satisfy the Judge *by affidavit* that the cause of action arose in Ontario. The Judge makes the order to proceed because he is satisfied, and has the jurisdiction to do it under the statute because he is satisfied.

Most of the authorities are on the first clause of sec. 44, which applies to torts. Under the other clause it is sufficient, if the contract was made within Ontario, if the breach occurred out the Province. It is immaterial in such contracts if the breach occurred within the Province or not, but not so as to cases under the first clause : *Cherry v. Thompson*, 41 L. J. Q. B. 243, L. R. 7 Q. B. 573 ; *Cookney v. Anderson*, 32 L. J. Ch. 427, 429, 430 ; *Durham v. Spence*, 40 L. J. Ex. 3 ; S. C. L. R. 6 Ex. 463 ; *Oriental Hotel Company v. Pelly*, 38 L. J. Ex. 39 ; *Glover v. Persigny*, 11 W. R. 146 ; *Jackson v. Spittall*, 39 L. J. C. P. 321 ; S. C. L. R. 5 C. P. 542.

The conflict of authority is under the first clause of the section—the Court of Common Pleas and Exchequer differing from the Court of Queen's Bench ; but these disputes are foreign to this case. Here there was no contract in England : it was made in Ontario.

The correspondence shews a contract : *Harty v. Gooderham et al.*, 31 U. C. R. 18 ; *Leeming et al. v. Snaith*, 16 Q. B. 275 ; *Thorne v. Barwick et al.*, 16 C. P. 369.

This contract, though made through an agent, was a contract with defendants : *Green v. Kopke*, 18 C. B. 549 ; *Calder et al. v. Dobell*, L. R. 6 C. P. 486 ; *Edmunds v. Bushell*, L. R. 1 Q. B. 97.

As to sufficiency of contract, see *Jones v. Gibbons*, 8 Ex. 920; *Buxton v. Rust*, 41 L. J. Ex. 173; *Bailey et al. v. Sweeting*, 30 L. J. C. P. 150; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Smith v. Neale*, 2 C. B. N. S. 67.

The contract was partly performed by delivery of some of the iron, which was paid for, as appears from the affidavits. As to the effect of this see *Catling v. Perry*, 2 F. & F. 140.

See also *Reuss et al. v. Picksley et al.*, L. R. 1. Ex. 342; S. C. 4 H. & C. 588; *Liverpool Borough Bank v. Eccles et al.*, 4 H. & N. 139; 3 *Burge's Colonial Law*, 753; *Adams v. Lindsell et al.*, 1 B. & Al. 681; *Higgins et al. v. Dunlop et al.* 1 H. of L. cases 381; *Jones v. Gibbons*, 8 Ex. 920; *British and American Telegraph Company v. Colson*, Ex. Ch., L. R. 6 Ex. 108.

Burton, Q. C. contra. As to delay, the Chief Justice of the Court of Common Pleas, when the application was before him, held it was in time, and the Court will not now give force to that objection. If there is any doubt as to the fact of his deciding that the application was in time, there can be no doubt it ought to have been raised before him. If it was raised he has virtually decided it by referring the matter to the full Court; and if it was not then raised the plaintiff should not be permitted to raise it now. The delay was explained before him, and the other questions only were reserved for this Court. The motion, in many similar cases to this, is to set aside the writ. In case of a foreigner residing abroad, in an action *ex delicto*, when the cause of action arose abroad, a writ against a foreigner would be a nullity, and might be moved against at any time: *Cherry v. Thompson*, L. R. 7 Q. B. 573. Here the defendants' agent resided at Montreal, and the breach of the contract, wherever the contract may be considered to be made, without doubt occurred at Liverpool. The whole cause of action ought to arise in this Province to give the Court jurisdiction; and, therefore, as the breach occurred at Liverpool, this Court has no jurisdiction over the defendants under the statute. *Cherry v. Thompson*, L. R. 7 Q. B. 573, already cited, reviews the decisions under the Common

Law Procedure Act, and the law is laid down in that case as Mr. *Martin* states it. But it is contended, first, that it is impossible to winnow a contract out of this correspondence, for it appears that the contract, if any, was made through the medium of letters. The first of these, if written in Montreal, in the Province of Quebec, and addressed to the plaintiff at Hamilton, within this Province, and replied to by him from Hamilton, resulted in a contract to be performed in England, or it was a contract made in Montreal where the agent accepted it. Such being the case it cannot be considered a contract made in this Province: *Westlake* on International Law, secs. 178, 179, and authorities there referred to. See also *Dunlop et al. v. Higgins et al.*, 1 H. L. Cas. 381.

RICHARDS, C. J., delivered the judgment of the Court.

In the affidavit filed on obtaining the summons from the learned Chief Justice of the Court of Common Pleas, Mr. Burton, the partner of defendants' attorney, states, amongst other things, that on examining the correspondence furnished him by his clients in relation to this matter, he came to the conclusion that neither the contract itself nor the breach of it took place in Ontario, and so advised. He also shews sufficiently satisfactory grounds for the delay in applying for the summons to set aside Mr. Dalton's order allowing the plaintiff to proceed.

In the argument before us, it was assumed there was a contract between the parties, arising out of the correspondence referred to in the affidavit. Our attention was not called to the correspondence with a view of shewing that the offer of defendants' agent to supply the plaintiff with the boiler plate on the terms offered in the letters and telegram of the 22nd July, was not in fact accepted, so as to make a complete contract by plaintiff's letter and order of the 24th July.

If it was accepted, the doctrine laid down, and illustrations given in *Burge's Colonial Law*, vol. iii., pages 752, 753, seem to shew that the contract was made in Ontario, though the boiler plate was to have been delivered in Liverpool.

In *Story's Conflict of Law*, at sec. 269 *a*, and sec. 285, this doctrine seems to be confirmed, and reference is made to some American authorities sustaining the same view.

The following extract from *Burge's Colonial Law*, vol. iii. p. 752, seems to lay down doctrines that are reasonable, independent of the authorities cited to sustain the view presented: "When the parties do not reside in the place where the contract is made, and it is effected by means of agents or letters, the place in which the final assent is given by the party to whom the proposition was made, is that in which the contract is considered to have been made: '*Contractus vel negotium inter absentes gestum dicitur eo loco, quo ultimus in contrahendo assentitur, sive acceptat, quia tunc tantum uniuntur ambo consensus.*' Thus if a merchant at Genoa, by letter or by his agent, offer his goods to a person at Venice [for a certain price, and the latter agrees to purchase them at such price, the contract or sale is said to have been made at Venice: '*Et sic ultimus consensus emptoris unitur cum illò præcedenti venditoris.*' The vendor is, by means of his letter or agent, deemed to be present at Venice, and the sale concluded there. If, however, the merchant at Venice had refused to take the goods at the price demanded by the merchant of Genoa, but had made an offer to take them at a lower price, and the merchant of Genoa had acceded to that offer, then the contract of sale would be deemed to have been concluded at Genoa, '*quia ambo consensus tunc uniuntur Genue.*'"

See *Story's Conflict of Laws*, sec. 262 *a*, and sec. 285: *Pattison et al. v. Mills et al.*, 1 Dow & Clark 342; *Albion Fire & Life Ins. Co., v. Mills et al.*, 3 Wils. & Shaw 218; *Whiston v. Stodder*, 4 Martin La. R. 48.

The quotation from Casaregis Disc. 179, n. 10, p. 192, is given at length in *Story's Conflict of Laws*, sec. 285. He also refers to sections 1 and 2 of the same Disc.

In *Pattison et al. v. Mills et al.*, 1 Dow. & Clark 373, Lord Lyndhurst, as Chancellor, in the House of Lords, used these words, "If I, residing in England, send down my agent to

Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them."

In *Westlake's International Law*, sec. 178, this doctrine is laid down, "If there are several parties to a contract, the solemnities which must be satisfied by each are generally those of the place where he engages himself."

The learned author then proceeds to illustrate the proposition thus: "In applying this it will be recollected that if I become a party to a contract, through an offer or assent contained in a letter, the place where I engage myself is that whence the letter is despatched, even though, in the case of an offer, my obligation be not complete till it has been accepted elsewhere: this is a question of fact."

Acebal v. Levy et al., 10 Bing. 376, is referred to by Mr. *Westlake*, and it has been cited by other writers as shewing that the doctrine, that a contract by letter is deemed to be made where the letter is received, as laid down in the extract from *Burge* is not sustained in England. There the contract is said to have been by a letter, written to the plaintiffs in Spain, where the contract was to be performed. The Court held, that the contract set out in the count of the declaration relied on was not sustained by the evidence. It was urged on the argument, and seemed not to have been questioned, that the Statute of Frauds applied to the case; and commentators on the case say there is no similar provision in Spain to that contained in the Statute of Frauds. As a matter of fact, neither on the trial of *Acebal v. Levy*, nor in argument in term, was anything said about the law of Spain, in that respect. I fail to see how that case necessarily refutes the authorities cited in *Burge* and *Story*.

If the defendants had come in their own proper persons to Hamilton, and there agreed in writing to deliver plaintiff 500 tons of bar iron f. o. b. at Liverpool at a certain price per ton, and that agreement had been there signed by the plaintiff, there can be no doubt that contract would have been made in the Province of Ontario. Then what difference in principle is there between a merchant offering, by a letter delivered to me at Hamilton by the postmaster, to

deliver to me the same quantity of iron, on the same terms, if I would deliver my acceptance of the offer to the post-master at Hamilton within a reasonable time, and so did deliver my acceptance of the offer? As far as I am concerned the offer is made to me in Hamilton, and I accept it there. If I make him an offer, which he accepts, then the position is changed, and I in fact seek him and his domicile to deal with him, and he deals with me there.

Sections 43 and 44 of our Common Law Procedure Act contain provisions similar to what are contained in section 18 of the English Common Law Procedure Act of 1852.

There is one remarkable provision, viz., that the authority to serve persons out of the jurisdiction of the English Courts extends to *parties* residing in any place, *except in Scotland or Ireland*; the Parliament of Great Britain having power to bind British subjects, and to legislate exclusively for Ireland and Scotland; although foreigners owing no allegiance to the British Crown, and not bound to obey laws passed by the Imperial Parliament, are to be brought by a certain kind of proceeding to answer claims prosecuted in the Courts of England, whilst British subjects, residing in Ireland or Scotland, cannot be proceeded against in those Courts.

In *Cherry v. Thompson*, L. R. 7 Q. B. 574-579, Blackburn, J., reviews the conflicting decisions in England, as to the right of the Courts in England to take proceedings under the Common Law Procedure Act against parties residing abroad, on contracts made abroad, whenever the breach occurs within the jurisdiction of the English Courts, and comes to the conclusion, that as far as the weight of authority goes, it may be considered nearly equal.

In the course of his judgment he says, "They, the legislature, were giving powers to proceed not only against English subjects, whom our Legislature may bind as it pleases, but also against foreigners not resident in this country; and we cannot doubt that if our Legislature had enacted that a foreigner resident in his own country should be liable to

be served with our process, so as in case of his non-appearance to enable a plaintiff to proceed to judgment, for a cause of action arising in the country of the foreigner, the latter would be entitled to treat this as an usurpation, and his Government would have good ground for complaining of it. * * * The Legislature has carefully confined the power of compelling the appearance of the foreigner not resident in this country to two cases. The one is where the cause of action arises in this country ; and if this means the whole cause of action, the foreigner who is compelled to appear in our Courts to answer a cause of action arising entirely in our own country has no just cause of complaint ; but if he were compelled to appear when only a part of the cause arises here, we think he would have good cause to complain. The other case is where the foreigner has, either in person or by his agent, made a contract in this country, in which case there is at least a plausible ground for saying that the foreigner who has made a contract in this country cannot complain if he is called upon to answer in the Courts of this country for a breach of a contract made within it. * * * It appears to us that the Legislature intended carefully to distinguish between actions *ex delicto* and actions *ex contractu*, and to enable the British subject resident abroad, or a foreigner out of the jurisdiction, to be served with process and sued in our Courts—in actions of tort, where the whole cause of action arises in this country—in an action of contract, where the contract has been made within it, without regard to where the breach may occur, but still only when the contract is made in this country.”

The words of section 44 of our Common Law Procedure Act, necessary to be referred to, are as follows: “Upon the Court or Judge being satisfied that there is a cause of action which arose in Upper Canada, or in respect of the breach of a contract made therein, and that the writ has been personally served * * * such Court or Judge may from time to time direct, that the plaintiff shall be at liberty to proceed in the action,” &c.

In addition to the decision of the Court of Queen's Bench in *Cherry v. Thompson*, we have the decision as to the effect of similar words in our own Courts.

In *Watt v. Vanevery and Rumball*, 23 U. C. R. 196, the late Chief Justice of this Court, Mr. Draper, held that the cause of action under the Division Courts' Act of Upper Canada was not the contract only, but the breach of it. The words of the 71st section of the Division Court Act, as there quoted, are, "that any suit may be entered and tried in the Court holden for the Division in which the *cause of action* arose, or in which the defendant, or any one of several defendants, resides or carries on business at the time the action is brought."

Watt v. Vanevery et al. was followed in *Kemp v. Owen*, 14 C. P. 432, and in *Carsley v. Fiskien et al.*, 4 P. R. 255, in Chambers, by Mr. Justice Morrison.

I think we should follow the decision of *Cherry v. Thompson*, L. R. 7 Q. B. 573, as the most reasonable view to take of the intention of the Legislature in passing the Act, and as being in accordance with the decided cases in our own Courts under similar provisions.

The only question then is, was there a contract made by the letter and telegram received by the plaintiff in Hamilton, and by the order and letter in answer thereto, mailed in Hamilton to defendants' agent.

I think a contract may be made by such a correspondence, and if so, the weight of reason and authority is that it would be a contract made in Ontario to be performed in Liverpool.

Harty v. Gooderham, 31 U. C. R. 18, and *Thorne v. Barwick*, 16 C. P. 369, cited on the argument, seem to shew that a contract would arise out of this correspondence. If it does not, of course the plaintiff cannot recover, and he would fail in the action.

On the argument the defendants' counsel seemed to rely more on the fact, that the contract arising out of letters written respectively in Hamilton and Montreal, and the breach of the contract occurring in Liverpool, therefore the

Courts of this Province would have no jurisdiction, as the whole cause of action did not arise here. But if we are to hold, as I think we ought, that the contract was made in Ontario, then under the authority of *Cherry v. Thompson*, L. R. 7 Q. B. 573, the plaintiff would have the right to sue in our Courts, though the breach of the contract took place in Liverpool.

Rule discharged, costs to be costs in the cause.

HEDLEY V. SCISSONS.

Sale of timber by deed—Parol agreement—Trover—Evidence of conversion.

Defendant, by deed dated 26th September, 1870, agreed to sell to the plaintiff all the merchantable timber, &c., on defendant's land which the plaintiff could make by the first of May, 1871; any timber or logs left, standing or cut, after that date to be the property of defendant. The plaintiff made a large quantity of timber, and drew away some of it. On the 27th March, 1871, defendant verbally gave him leave to let the balance of timber made by him remain on the lot till fall, if the plaintiff would not strip the lot too much; and the plaintiff only cut for a day or two after that. Subsequently, and after the 1st of May, the plaintiff was forbidden to take such made timber off by one K., who said he had bought it, and by defendant who, as one witness said, claimed it as his own; and the plaintiff thereupon brought trover:

Held, that the made timber, which vested in the plaintiff as made, might properly be the subject of a parol contract with defendant, independently of the deed, and that the desistance of the plaintiff from stripping said lot before the 1st May was a sufficient consideration for the parol agreement.

Held, also that there was evidence from which a jury might infer conversion.

DECLARATION, that defendant converted to his own use and deprived the plaintiff of the use and possession of the plaintiff's goods, to wit, one hundred and ten pieces of oak timber, fifty pieces of ash timber, and two hundred saw logs.

Pleas,—Not guilty. 2. That the goods were not the plaintiff's.

Issue.

The cause was tried at the Spring Assizes of 1872, at Ottawa, before Morrison, J.

From the evidence given at the trial it appeared that on the 26th September, 1870, the defendant, by an agreement

under seal, in consideration of \$300, sold to the plaintiff all the merchantable timber on lot No. 6 in the second concession of the Township of Tarbolton. The description of the timber was, white pine, oak, not less than six inches at fifteen feet from the but, ash, not less than ten inches square; also anything in the shape of merchantable. The merchantable timber was to be *made* by the 1st day of May, 1871. Any timber or logs left standing or cut to be the property of the said Samuel Scissons, proprietor of the said lot; no other sort of timber to be cut, except what was necessary for roads and for bedding for said timber.

Under the agreement plaintiff went on to the lot and made a considerable quantity of timber, and cut a large number of saw logs, and drew a considerable portion off the lot.

On the 27th March he applied to the defendant for permission to allow the timber he had cut to remain on the place. Defendant said he was welcome to leave it, if he would not cut the lot too bare. He cut for a day and a-half after that. Plaintiff said he would lay the timber up in his bush. The defendant said nothing against his doing so. The plaintiff found the fire would not run into the bush, and he left the timber where it was.

In the fall he went to haul the timber, and one Kirwin forbid him taking it, saying he had bought it. He (plaintiff) afterwards met the defendant in the road, and asked him for the agreement he had signed, which he refused to give. He then demanded the timber. Defendant told him not to put a foot on the lot, or draw a stick off it, and refused to give him a copy of the agreement. The plaintiff said he would have had time to take it off before the first of May, if defendant had not allowed him the privilege of letting it remain over.

In addition to what he claimed in this action, he had taken off the place 2,437 good logs, and 300 pieces of pin oak, and ash. The saw logs in the wood he estimated at about 90 cents a log, and the oak trees 40 or 50 cents a log. He also took off the place some boom pieces, 25 or 30, and some flatted oak.

One of the plaintiff's witnesses said he left about 110 pieces of oak and 80 saw logs on the lot ; and made on the place 500 pieces of oak, and 2,430 logs.

A witness called by the plaintiff, speaking of the interview between him and the defendant, said, "Defendant said he would not allow him to draw the timber off, and not to put a foot on the place." This was the first of sleighing. He gave as a reason that the timber was to have been laid up in the hardwood bush. In his re-examination, the witness said, "Defendant said he claimed all the timber, and forbid him going on the lot."

Plaintiff was recalled after this witness gave his evidence, and was not asked any further questions as to the demand and refusal, or as to the defendant claiming the logs.

Other witnesses were called as to the value of the logs.

At the close of the plaintiff's case, defendant's counsel contended that the plaintiff could not recover, because he had no authority to go on defendant's land at the time referred to, and when he had forbidden him : that as to the timber, Kirwin claimed it, and forbid plaintiff taking it, and Kirwin took it away : that assuming the plaintiff claimed it, the agreement under seal between the plaintiff and defendant vested all cut timber on the land after the time mentioned in defendant ; and the plaintiff had no authority to enter on defendant's land ; that to acquire any such right or authority as claimed by the plaintiff, it was necessary there should be an instrument in writing ; that if there was a parol license it was countermanded ; at all events, to vary the sealed agreement required an agreement under seal, and also a writing to enable the plaintiff to go on the land ; that the plaintiff was not entitled to recover against defendant in trover as there was no evidence of conversion by the defendant, but only by Kirwin.

Lees, for the plaintiff, contended, that under the agreement the timber when severed became the plaintiff's.

The learned Judge nonsuited the plaintiff : the plaintiff's counsel objecting to the ruling, and submitting to be nonsuited out of deference to the opinion of the learned Judge.

In Easter Term last, *C. S. Patterson*, Q. C., obtained a rule *nisi* to set aside the nonsuit and for a new trial, on the ground that under the agreement in question, the plaintiff was entitled to a reasonable time after the first day of May, to remove the timber made before that date, and that such timber did not revest in the defendant; and that by reason of the consent of the defendant to the timber remaining on the land, he was precluded from claiming it under the said agreement.

The rule was enlarged from time to time until this Term, when *S. Richards*, Q. C., shewed cause. Here the agreement was under seal, and provided that all the timber which was not cut and taken off the place by the first of May, became the property of the defendant. The parol agreement to extend this time was not good or binding. The case of *West v. Blakeway*, 2 M. & G. 729, is stronger than this. There the tenant covenanted to yield up to the landlord all the erections set up during the tenancy; the defendant proved a verbal agreement between the parties, that if he built a green house, he should be at liberty to remove it. The Court held, notwithstanding a verdict for defendant as to that plea, that the plaintiff could recover at law for a breach of the covenant in taking away the green-house. *Taylor on Evidence*, 6th ed., p. 995, sec. 1043, lays down the rule of law correctly.

Besides there was no sufficient evidence of a conversion. There was no conversion in fact, and the demand was made off the premises. All that defendant did, was to refuse to give his consent to defendant going on to his land to remove the timber, and that is not sufficient evidence of a conversion.

C. S. Patterson, Q. C., contra. The sale is absolute to the plaintiff of all the timber on the lot for a sufficient consideration. The agreement is, that the said merchantable timber is to be made from the date of the agreement (6th September, 1870), to the first day of May, 1871. The exception means any timber or logs left standing or cut, (not made into merchantable) to be the property of the defendant. What is claimed is, the timber and logs that

were made into merchantable timber. Besides, at the time the permission was given to allow the timber and logs to remain it was already made, and was the goods and chattels of the plaintiff. The defendant might well, by parol, allow it to remain on his land as long as he pleased. He might withdraw the parol license, but that would not vest the ownership of the chattels in him, defendant.

There was evidence of a conversion. The defendant, in reply to a demand for the timber, claimed it as his own, and forbid the plaintiff to go on to the land to take it. That would be evidence to go the jury, from which to infer a conversion.

RICHARDS, C. J., delivered the judgment of the Court.

We think there is sufficient in the arrangement between the plaintiff and the defendant, from which a consideration may be inferred to support a new contract to allow his, plaintiff's, chattels: viz., the timber that was made upon the 27th or 28th of March, to remain on the defendant's land until the following fall. The defendant agreed, that if the plaintiff would not strip the land too much, that is, cut too much off the place, he might store on the land that timber which he made, to within a reasonable time.

The plaintiff seems to have honestly carried out that part of the agreement, and only cut for a day or two after he, defendant, consented to his allowing the timber to remain over until the next fall. This is not merely varying the terms of a written instrument under seal by parol, but is making a bargain about certain personal property, which was *then* the plaintiff's, and which he could have then removed with many more of the trees that were growing on the defendant's land, but in consideration of his not cutting down more of the trees defendant agreed to permit the plaintiff to keep them on his land instead of drawing them off. The modern authorities seem rather to permit this kind of an arrangement to be made.

The evidence as to conversion is not very distinct. A jury might possibly infer a conversion from the facts; particularly as one of plaintiff's witnesses, though not the plaintiff

himself, says that defendant refused to let him, the plaintiff, have the timber, because he claimed it himself.

Merely forbidding the plaintiff to go on his land would not, I infer, be evidence of a conversion. Selling it, of course, would be an actual conversion. The person who first forbid the plaintiff taking the timber, and claimed it as his, said he had bought it. He did not say from whom.

On the whole we think there must be a new trial without costs.

Rule absolute.

KIPP v. THE INCORPORATED SYNOD OF THE DIOCESE OF TORONTO.

Ejectment—Statute of Limitations—Nonsuit.

In ejectment, where defendants claimed title by possession, and the plaintiff was found to have been out of possession for twenty years, the jury were directed that to entitle defendants to a verdict, they must shew twenty years continuous possession in themselves, and those under whom they claimed.

Held, a misdirection; for an owner out of possession for twenty years may be barred, though no one of the occupants may have obtained a statutory title.

EJECTMENT for the westerly half of lot one in the first concession of East Oxford.

The plaintiff claimed title as devisee of William Kipp, and through him from David Kipp, the grantee.

The defendants claimed title by deed derived from or under the grantee of the crown, and they also claimed the land by length of possession, as forming the easterly ninety acres of lot two in the said concession, as particularly described in the notice.

The cause was tried before Morrison, J., at the last Fall Assizes at Woodstock.

It appeared from the evidence that David Kipp was the original grantee of lot one, and Admiral Vansittart of lot two.

The land in dispute was an excess or surplus beyond what either grant covered, and it was claimed by Admiral

Vansittart from David Kipp, who gave it up rather than go to law.

The plaintiff's evidence shewed that one Scott had been let into possession by Vansittart adversely to the plaintiff about nineteen years before the action was commenced; and other persons were proved to have been in possession adversely to the plaintiff before Scott for several years.

The evidence preponderated in favor of defendants as to possession having been in Vansittart and his tenants, or at all events out of the plaintiff, for over twenty years.

A nonsuit was moved for at the close of the plaintiff's evidence, and at the close of the case, and refused, but leave was given to move in term.

The learned Judge told the jury, that if they were of opinion that the land in dispute was part of lot number two, they should find in favor of the defendants; if part of lot one, they were to consider the question of possession, and to entitle the defendants to a verdict, they and those under whom they claimed should have had twenty years continuous possession. The latter part of the charge was objected to by defendants' counsel.

The jury found a verdict for the plaintiff.

In Michaelmas Term last, *Anderson*, Q. C., obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, on the ground that the plaintiff's evidence established that the right of entry of those through whom he claimed first accrued more than twenty years before the commencement of the action; or for a new trial without costs, on the ground of misdirection in the learned Judge who tried the cause, in telling the jury that in order to entitle the defendants to succeed they must prove that they, and those under whom they claimed, had been continuously in possession for twenty years, and on the ground that the verdict was against law and evidence.

The rule was enlarged to this term, when *Freeman*, Q. C., shewed cause. As to the question of possession the charge was right. [MORRISON, J.—I think I should not have said that it was necessary to prove twenty years' continuous

possession in defendants, and those from whom they claimed. WILSON, J.—It is necessary that plaintiffs should claim one under the other, but not for defendants. It is not open to argument.] It is submitted that it is. If the plaintiff has lost his title by possession, some one must have got it. [WILSON, J.—It was only necessary here to show that the plaintiff had been out of possession for twenty years.] Assuming that, there should not be a nonsuit, but a new trial.

Harrison, Q. C., and Anderson, Q. C., contra. It was proved that several parties were in possession for some years before Scott; and the plaintiff having called Scott, and proved that he went into possession nineteen years ago, the plaintiff was put to proof that his right of entry arose within twenty years before the commencement of the suit. The only question is, whether there should be a new trial or nonsuit. The evidence which the plaintiff should have supplied, was wanting, and therefore there should be a nonsuit. *Penton v. Grand Trunk Railway*, 28 U. C. R. 367, was referred to.

RICHARDS, J., delivered the judgment of the Court.

We have gone over the evidence carefully, and think it fully sustains the view that the plaintiff and those under whom he claims, have been out of possession of the land in question for more than twenty years continuously before the commencement of this action; and as leave was given to move to enter a nonsuit on this ground, we think it must be made absolute.

Doe dem. Carter v. Barnard, 13 Q. B. 945, may be referred to as shewing what the law is on this subject. That case is cited and not disapproved of in *Asher et ux. v. Whitlock*, L. R. 1 Q. B. 1.

The law seems to be well settled, that the real owner who has been out of possession for twenty years and more continuously, cannot maintain ejectment, though no one of the occupants for portions of the twenty years may have obtained a statutory title.

If we had not been able to direct a nonsuit to be en-

tered, we should have been obliged to have granted a new trial for misdirection on this point.

We probably would have granted a new trial also, on the ground that the verdict was contrary to law and evidence, had it been necessary to consider the evidence on that point.

Rule absolute for nonsuit.

RE LAWRENCE AND THE CORPORATION OF THE TOWNSHIP OF THURLOW.

Mandamus to open highway—Proof of confirmation by Sessions—50 Geo. III. chap. 1.

On an application for a mandamus to open a highway, alleged to have been established by the Sessions in 1839, under 50 Geo. III. chap. 1, a surveyor's report, dated 5th July, 1839, that he had laid out the road, was produced from the Clerk of the Peace, on which was an endorsement, not dated: "Allowed, Isaac Fraser, Chairman Quarter Sessions, M.D.;" but that Report bore no date of filing or entry, and there was no entry in the minutes of the July or October Sessions of any order referring to this report.

Held, that the application must fail, for want of proof that the report was filed or presented to the Sessions next after its date, or the road ordered to be opened.

Semble that if there had been a minute in the proceedings of the then next Sessions, that the report was presented and the road ordered to be opened, the Court would presume that the Sessions had done all that was necessary to warrant such an entry or minute.

Semble, that a minute of the allowance of the report, omitting to show that the road was ordered to be opened, would not be sufficient.

IN Michaelmas Term last, *McKenzie*, Q. C., obtained a rule *nisi* calling on the corporation to shew cause why a writ of mandamus should not issue, commanding the Council of Thurlow forthwith to open up and make passable a certain road or highway theretofore surveyed and laid out by Thomas Clapp, P. L. S., across lots numbers eleven, twelve, thirteen, and fourteen, in the seventh concession of Thurlow, under the authority or order of the Court of Quarter Sessions of the Midland District, made in or about the year 1839; or to open up and make passable the concession line or road between the sixth and seventh concession, on the ground that it is the duty of the corporation to open up and make passable the said road, &c.

The application was made upon filing a number of affidavits, the contents of many of which it is not necessary to refer to. The principal ground upon which the application was based was, that the road sought to be opened was a road laid out and ordered to be opened by the Court of Quarter Sessions of the Midland District, under the provisions of 50 Geo. III. chap. 1.

It appeared that upon making search in the office of the Clerk of the Peace for the county of Frontenac,—Thurlow, at the time, 1839, being in the Midland District,—that the several documents following were found :—

A report, addressed to the Justices of the Peace for the Midland District in General Sessions assembled, by Thomas Clapp, surveyor of highways in and for the County of Hastings, in the Midland District.

This set out that on an application in writing being made to such surveyor by twelve freeholders, &c., bearing date 1st of July, 1839, requesting him to proceed to the laying out of a line of road, set out in their application, according to law, and to report the same at the ensuing Sessions of the Peace, he, the surveyor, proceeded to examine the same, which he surveyed and laid down as follows: *commencing between lots Nos. 13 and 14 in the centre of the seventh concession, then taking a west course across No. 13 to the allowance; then following the allowance about 100 rods; then taking a south west course till it intersects lot 10 in the sixth concession, continuing the course as near as the land will admit in the fifth concession, to intersect Reed's mills on lot number five.*—(This description was accompanied by a sketch of the road); and that he had made the road forty feet in width; and further stating that he gave public notice of the survey according to law, by affixing a copy of the report in two of the most public places, next adjacent to the place where the aforesaid survey had been made.

The report was dated at Thurlow, the fifth day of July, 1839.

The present Deputy Clerk of the Peace, swore that he

had carefully looked through the minutes of the July and October Sessions of the year 1839 and the following year, and could find no minutes of any order referring to this report.

The report itself bore no date of filing or entry whatever. All that appeared upon it, was the following endorsement: "Allowed," (signed) "Isaac Fraser, Chairman Q. S. M. D."

The Deputy Clerk of the Peace stated that from the records it appeared to have been the Clerk's practice to invariably enter a minute of any new order when passed; and he thought that by some oversight, or from hurry, a minute of the order in this case was not entered: that Isaac Fraser was Chairman of the Sessions, and that the signature endorsed on this report was evidently the signature of the same person who signed other reports.

The Deputy Clerk of the Peace also stated his opinion, that the report was drawn up at the July Sessions, 1839, as the first day of those Sessions was the 9th July, 1839; but he gave no reason other than the date of the report for his arriving at that conclusion.

There were numerous affidavits filed on both sides which it is unnecessary to set out, as the judgment of the Court does not refer to them.

During this term, *Diamond* shewed cause. The petition and report relied on here do not make out a case within 50 Geo. III. chap. 1: *Rex v. Sanderson*, 3 O. S. 103; *Purdy v. Farley*, 10 U. C. R. 545, 562.

The road never went beyond the east half of lot 13, and was not opened beyond that. The owner of the lot has made deeds to other parties, and it should be shewn that no other mode of travel exists. We shew by affidavit that there is another more convenient way. He also referred to *Tapping* on Mandamus, 131, 132, as to repairing the road. A demand and refusal to open the road should be proved, and none is shewn: *Tapping* on Mandamus, 283, 284; *Regina v. Field*, 27 L. J. N. S. Q. B. 63. The report is uncertain and cannot be acted on: *Carrick v.*

Johnston, 26 U. C. R. 80; *Re The Municipality of the Township of Augusta, and the Municipal Council of the United Counties of Leeds and Grenville*, 12 U. C. R. 522; *McIntyre v. The Municipal Council of Bosanquet*, 11 U. C. R. 460; *Regina v. Hall*, 17 C. P. 282; *Clapp v. Haight*, 19 U. C. R. 94; *Re Burritt and The Corporation of the Township of Marlborough*, 29 U. C. R. 119. At all events there should only be a *mandamus nisi*.

McKenzie, Q. C., and *George E. Henderson*, supported the rule. The establishment of the road is sufficiently proved. [MORRISON, J.—Have you shewn that the road was established at all? There is no evidence of notice, and it is not stated or shewn at what Sessions the report was confirmed. If you do not establish that, you have no case, under *Regina v. Great Western Railway*, 32 U. C. R. 506.] The road was established, but not opened, which is sufficient: *The Municipality of the Township of Augusta and The Municipal Council of the United Counties of Leeds and Grenville*, 12 U. C. R. 522. The Court will grant a *mandamus* when there is a duty to be performed: *Caswell v. St. Mary's Road Company*, 28 U. C. R. 247. As to any objection that might be urged from passing through an orchard, see *Scarlett v Corporation of York*, 14 C. P. 161. The road is of general public benefit; it is intended to continue it to the 8th concession, and make it a thoroughfare to the mill and school in the neighborhood. Therefore, though of particular interest to the applicant, it is of vital interest to all living in the vicinity of it.

MORRISON, J., delivered the judgment of the Court.

As said by Coleridge, J., in *Rex v. The Nottingham Water Works Company*, 1 N. & P. 493—"The principle on which the writ of *mandamus* goes, is very well known: two things must concur: a specific legal right, and the absence of an effectual and efficient remedy for the enforcement of that right."

In this case, it was therefore incumbent on the applicant, to entitle him to the writ, to shew that the road in ques-

tion was one duly established and ordered to be opened under the provisions of the Statute of Upper Canada, 50 Geo. III. chap. 1, sec. 3.

This is denied; and the first and principal question we have to consider is, whether the applicant has produced sufficient material to sustain that part of his case; if not, the rule must be discharged.

Section 3 of the 50 Geo. III., ch. 1, enacts, that upon application of twelve freeholders to any surveyor of highways, stating that it is necessary to open a new highway, it shall be lawful for such surveyor and he is thereby required to examine the same and report thereon in writing to the Justices at their next ensuing Quarter Sessions, describing the new highway or road to be opened; giving at the same time public notice thereof, by affixing a copy of the report in two or more of the most public places, next adjacent to the place where the new road is to be opened; and if no opposition as is thereafter mentioned, shall be made to such report, it shall and may be lawful for the said Justices, and they are thereby required, to confirm the said report and direct such new road to be opened accordingly; and such road is declared to be a common and public highway.

Now in this case, all that appears by the affidavits filed is, that on a search being made in the office of the Clerk of the Peace for the county of Frontenac, a report of a surveyor of highways is found, dated the 5th of July, 1839, reciting that an application dated the 1st of July, 1839, signed by twelve freeholders, was presented to such surveyor to lay out a new road, and to report the same at the ensuing Sessions; and that he, the surveyor, surveyed in pursuance of such application, and laid down a road described and set out in the report, and which is the line of road now in question; and that he gave public notice of the survey according to law, by affixing a copy of the report in two of the most public places adjacent to where the survey was made.

There is nothing shewing that this report was made to, or laid before the Justices at their then next ensuing Ses-

sions following the 5th July, or at any other Sessions ; and it is clearly shewn that there is no minute or entry in the records of the proceeding of the July Sessions or any other Sessions relating to or referring to this report or road ; or a minute or record that the report of the surveyor was confirmed at such July or other Sessions, or directing such road to be opened. All that appears is, an indorsement on the report, without date, in these words, " Allowed, Isaac Fraser, Chairman, Q. S. M. D."

There is no date shewing that it was ever filed, and no other minute or entry is made in relation to it.

" When a road is required to be proved under the Act," Sir James Macaulay, in *Rex v. Sanderson*, 3 O. S. 103, says, " an observance of its provisions must be shewn. The surveyor can only act at the instance of twelve freeholders. He must give notice of the report to be made. It must be submitted at the *next* Sessions, and if not opposed, be *confirmed thereat, and the road ordered to be opened.*"

If there had been any minute entered upon or appearing among the records of the July Sessions, by which it appeared this report was laid before the Justices and confirmed, and the road ordered to be opened, I think we might assume that the Sessions did all that it ought properly to have done to warrant such entry or minute ; but it is clear, from the affidavit of the Deputy Clerk of the Peace, filed by the applicant, that no such minute or entry appears to have been made at such Sessions or any other Sessions.

Can we say or assume that the endorsement without date, which appears upon a report without a date of filing, is of itself sufficient evidence that the requirements of the Statute were complied with : that the report was confirmed at the July Sessions, and the road ordered to be opened, and so established as a common and public highway ?

I think not ; and as the applicant fails to make out that the road was duly established under the 50 Geo. III. chap. 1, this rule must be refused.

We do not think, that assuming that it appeared that

the report was laid before the Justices at the July Sessions, and that the Justices merely made a minute that the report was allowed, without directing or ordering that the road so reported should be opened, that such a minute would be sufficient to establish the road under the Statute as a public highway.

I refer to the case of *Regina v. Great Western Railway Company*, in this Court, reported in 32 U. C. R. 506.

Rule discharged.

HALPENNY V. PENNOCK.

Husband and wife—Purchase of goods, and chattel mortgage by wife—Agency implied—Leave and license—Evidence.

The plaintiff went to British Columbia nine years before this action, leaving his wife here, to whom he wrote and occasionally sent money. She procured the defendant to endorse a note made by her for the price of furniture to carry on a boarding house (which she subsequently carried on with the plaintiff's knowledge,) and executed to defendant a chattel mortgage under seal in her own name on said furniture. The rent of the house being in arrear, and part of the mortgage money overdue, the landlord distrained, and the defendant enforced his mortgage; and the plaintiff's wife not dissenting, but rather assenting, the goods were sold, and the balance after the payment of rent and mortgage was handed over to her. The plaintiff thereupon sued the defendant in trespass and trover.

Held, that the wife was the agent of her husband, the plaintiff, in respect to purchasing the furniture, and to do all that was necessary to acquire it.

Held also, assuming that she exceeded her authority in giving a mortgage under seal, yet as the mortgage would be valid without a seal in her own name, the seal did not make it invalid for all purposes, or prevent it from being given in evidence as a justification derived from the plaintiff through his agent of the acts complained of.

Held, also, that as by this action the plaintiff ratified the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mortgage which formed part of the whole arrangement.

Seemle, that the wife standing by and permitting the sale of the property under the mortgage was some evidence under the plea of leave and license.

Per Wilson, J.—Under C. S. U. C., ch. 73, the wife had power to buy the furniture with her own means and on her own credit, and to deal with it as if sole and unmarried; and in the ordinary exercise of that right she could give a mortgage by deed in her own name as if a *feme sole*.

TROVER for certain articles of furniture, with a count in trespass for the same goods.

Pleas—1. Not guilty. 2. Not possessed. 3. Leave and license. Issue.

At the trial, before *Richards*, C. J., at the last Ottawa Fall Assizes, it appeared that the plaintiff left his wife and went to British Columbia about nine years ago, where he still resided at the time of the trial: that when he left this province his wife was on a small farm which he owned, but which was mortgaged, and which the mortgagee subsequently took possession of; that his wife left the farm and came to Ottawa to reside, and commenced keeping a large boarding house there; and for that purpose purchased a quantity of furniture on credit, of which the furniture in question formed a part: that the seller required security, and the wife applied to defendant to be surety for the price of the furniture; that he consented to do so, and the plaintiff's wife gave a note for the amount in her own name, endorsed by the defendant; and to secure the defendant, a chattel mortgage was given to the defendant upon the furniture, which chattel mortgage was made in the name of the wife, and executed by her in her own name. The instrument was under seal.

It also appeared that the wife carried on the business of boarding house keeper for some time: that during such time the plaintiff corresponded with her and remitted her money on several occasions: that the rent for the house she occupied getting in arrear, and a distress being about to be issued, and a portion of the price of the furniture remaining unpaid to the defendant and secured by the chattel mortgage, the bailiff who had the distress warrant for the rent was authorized also to take possession of the furniture mentioned in the chattel mortgage, and the defendant declining to extend the time for payment of the amount due to him, with the consent of the wife, the furniture in question was sold.

The proceeds of the sale realized the rent, the amount due to defendant, and a balance which was paid over to the plaintiff's wife.

No person either on behalf of the plaintiff or otherwise forbade the sale of the furniture.

Some time after these proceedings one Falls, who was cognizant of all the transactions referred to, who drew the chattel mortgage, and was privy to the sale of the furniture, being advised, or discovering, as he believed, that the chattel mortgage was not binding on the plaintiff, communicated with the plaintiff and obtained a power of attorney from him, and brought this action for him.

A good deal of evidence was given in reference to the circumstances under which the plaintiff's wife removed to Ottawa, the purchasing of the furniture, the carrying on of the boarding house, the correspondence with the plaintiff, and sale of the furniture in question under the distress warrant and the chattel mortgage.

At the close of the case the learned Chief Justice, before whom the case was tried without a jury, found as follows :— That the plaintiff's wife was carrying on the business of keeping a boarding house, with the knowledge of the plaintiff, her husband : that she was authorized by him, from the nature of the business to make contracts and bargains in relation to that business, and that, at the time she purchased the additional furniture, it appeared reasonable to do so ; and also that if she had power to make the mortgage, the consideration for doing so was sufficient ; and in that case, the defendant should succeed : that it appeared from all the papers and evidence that the wife had property besides that purchased, and for which the defendant went surety ; but whether such other property was purchased with the plaintiff's money, or by the proceeds of his labor, the learned Chief Justice could not say ; he was of opinion, however, that she might have sold and exchanged such property to buy other articles. As a matter of law, he did not say whether the wife was authorized to make the mortgage. If the Court should think such an inference might fairly be drawn, then the verdict should be for the defendant.

As to the plea of leave and license, the learned Chief

Justice was of opinion from the evidence, that the plaintiff's wife did not want any of the property sold, but that if the defendant was determined to sell, then she desired all sold for the best price; and he was of opinion that that kind of consent did not cover the illegal act of the defendant if he was not authorized to sell by virtue of his mortgage.

He found the value of the goods to be \$500, and deducting \$368, he entered a verdict for the plaintiff for \$132, with leave to move, &c.

In Easter term last, *S. Richards*, Q. C., obtained a rule *nisi* to enter a verdict for defendant, pursuant to leave, on the grounds taken at the trial; or why the verdict should not be entered for the defendant, or a new trial, the verdict being against law and evidence, on the grounds: that the property was not shewn to be the property of the plaintiff: that the evidence sustained the plea of leave and license; and that the defendant was and is entitled to a verdict.

Harrison, Q. C., shewed cause. There was more property sold than was necessary, and as to that, at all events, the defendant was liable: *Batchelor et al. v. Vyse*, 4 Moo. & Sc. 552. The property was not the separate property of the wife; she had no order of protection; she was not in the position of a wife abandoned by her husband, and she had no power to mortgage the goods in question: *Kraemer v. Gless*, 10 C. P. 470; *Balsam v. Robinson*, 19 C. P. 263. There is no implied authority in her to contract as she has done: *Wright v. Garden et ux.*, 28 U. C. R. 609; *Houlston v. Smyth*, 3 Bing. 127; *Wilson v. Ford et al.*, L. R. 3 Ex. 63; *Brown et al. v. Ackroyd*, 5 E. & B. 819; *Ladd v. Lynn*, 2 M. & W. 265; *Ringham v. Clements*, 12 Q. B. 260; *Meredith v. Footner*, 11 M. & W. 202; *May v. Skey*, 13 Jur. 594; *Bazeley v. Forder*, L. R. 3 Q. B. 559; *Calland v. Loyd*, 6 M. & W. 26. If there was authority there was no proper execution by the wife: *Dacksteder v. Baird*, 5 U. C. R. 591. There was no evi-

dence of leave and license : *Thompson v. Van Buskirk, et al.*, 14 U. C. R. 388.

S. Richards, Q. C., contra. The husband having been in British Columbia for ten years, and continuing to contribute to her support must be taken to have constituted her his general agent, and her acts are his. At all events she had the right to deal with this property as her own, as she had acquired it by her own exertions, and it was her separate property. This being the case she could transfer: *Royal Canadian Bank v. Mitchell*, 14 Grant 412; *Wright v. Garden et ux.*, 28 U. C. R. 609. But if there is no valid mortgage the defendant has a lien until he has been paid upon the goods—in other words, they are his property until then. As to the surplus, leave and license has been sufficiently shewn. Though the wife might not be able to bind herself by a contract, she could effectually transfer. The transaction is one that the Court would desire to uphold.

MORRISON, J.—I concur in the finding of the learned Chief Justice, that it was a fair inference, from all the evidence, that the plaintiff's wife was acting as his agent in the transactions respecting the purchase of the furniture in question.

The fact of bringing this action is, in my opinion, a ratification and evidence of the agency of the plaintiff's wife in the purchase of the goods.

It was contended on the part of the plaintiff, that the wife had no authority to give a chattel mortgage under seal, or any mortgage whatever; that it was void *in toto*: that as she executed it in her own name it did not bind the plaintiff; and that the defendant was not justified or authorized in taking the goods in question even with the consent of the plaintiff's wife.

The first question to be considered is, whether the plaintiff's wife, as agent of her husband, had any authority to give the chattel mortgage under which the defendant claims.

It did not appear that she had any authority in writing to execute any instrument under seal, and we may assume that she exceeded her authority in that respect. But the agency being established, she could give a mortgage not under seal, if such a mortgage of chattels may be made; and *Flory v. Denny*, 7 Ex. 581 is an authority that there well may be a mortgage of chattels without deed.

That being the case, does the fact of this instrument or mortgage being made under seal make it void and inoperative for every purpose? I am inclined to think not. I am rather of opinion that an instrument so executed may be used in this case and given in evidence, and operate as a justification and authority derived from the plaintiff through his agent to do the acts complained of.

In *White v. Cuyler*, 6 T. R. 176, the defendant's wife, by an agreement under seal made in her own name, agreed to take the plaintiff into her service. An action was brought against her husband, General Cuyler, to recover some money agreed to be paid by the deed. An action of assumpsit was brought and the sealed instrument offered in evidence. It was objected, that the action would not lie, that the plaintiff should have sued on the deed. It was overruled, and a rule was obtained to enter a nonsuit. The Court held assumpsit would lie; that while the covenant did not bind her husband, nevertheless the deed could be used in evidence of the hiring, &c. See the same case in 1 Esp. 200.

In the case before us, the instrument is not being used as an instrument under seal, or, in other words, it is not essential to its validity as a mortgage that it should be sealed; and it seems to me that we would not be infringing any principle of law in holding that this instrument may be used and given in evidence as a justification and authority for the defendant dealing as he did with the goods in question; that the mortgage should operate between the plaintiff and defendant as an instrument not under seal.

Then as to the contention that the mortgage, being made

by the plaintiff's wife in her own name, was in no wise binding upon the plaintiff; assuming that it may be treated as an instrument not under seal, it is clear upon authority that an agent so contracting in her own name, the principal is bound by the contract.

Mr. *Story*, in his work on Agency, 7th ed., p. 104, sec. 160 *a*, says: "That if an agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown * * * the principal also will be liable to be sued, and be entitled to sue thereon in all cases," &c.

I also refer to *Higgins et al. v. Senior*, 8 M. & W. 834; and to a late case of *Calder et al. v. Dobell*, L. R. 6 C. P. 486, affirmed in the Ex. Ch. same vol. p. 498. In this latter case the subject is fully discussed, and all the authorities referred to.

As to the giving of the mortgage, I agree with the learned Chief Justice in thinking that she was authorized by the plaintiff to do whatever was necessary to obtain the furniture, in order to carry on the business of boarding house keeper: that for that purpose she had to seek the assistance of the defendant to be surety for the plaintiff, her husband, by endorsing the note given by her for the price of the furniture. If the plaintiff's wife under the circumstances had, as security, mortgaged the goods to the vendor, I apprehend no doubt could arise as to her authority to do so in that case. On principle I see no difference, considering the position of the defendant, in giving him a like security to secure him against loss should he be compelled to pay the amount of the note given for the purchase money to the vendor.

The furnishing and carrying on of the boarding house, owing to the absence of her husband, was under the immediate direction and control of the plaintiff's wife; and, as said by *Pollock*, C. B., in *Ruddock v. Marsh*, 1 H. & N. 605, a case in which the authority of a wife was in question, "A partner is a particular kind of agent who has a general

authority to bind his partners by contracts made in the course of business; and in like manner a wife has authority with reference to such matters as are usually under the control of the wife."

This is not an action in which the plaintiff is disputing his liability for the price of the furniture. It is an action, as I remarked before, by which he is ratifying the act of his agent in purchasing the furniture as she did, by giving her note endorsed by the defendant for the principal money, and which note the defendant had to pay. The defendant claims title under that purchase. I do not think the plaintiff ought to be allowed to say, that he is not bound to carry out the arrangement so made on his behalf by his wife.

In *Story on Agency*, 7th ed., p. 293, sec. 250, the learned author says, "Another consideration, very important in cases of this sort, is, that the principal cannot, of his own mere authority, ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole or none. And hence the general rule is deduced, that when a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent."

In this case, the purchase of the furniture, the giving of a note endorsed by the defendant for the price, the making of the mortgage to secure the defendant, were all parts of the one transaction; and upon the principle laid down by Mr. *Story*, the ratification of the purchase so made by the plaintiff's agent, carried with it a ratification of the other incidents.

I am also inclined to think that the fact of the agent giving the mortgage to the defendant, and default happening, and the agent not dissenting but permitting the defendant under the authority of the mortgage to dispose of the goods, was evidence to establish the defendant's pleas of leave and license.

On the whole I am of opinion that the rule to enter a verdict for the defendant should be made absolute.

WILSON, J.—Apart from the Consol. Stat. U. C. ch. 73, I agree in all that has been said by my brother *Morrison*, J. I wish however to add that under the statute referred to, the wife had the power to buy the goods in question, in my opinion, with her own money, or on her own credit and responsibility, and to deal with them in any manner she chose, in as full and ample a manner as if she had been *sole* and unmarried. And in the ordinary exercise of that right and power, she had authority to give a mortgage by deed in her own name, which was as available to the mortgagees as if it had been made by a *feme sole*.

RICHARDS, C. J., having been absent on account of illness during the argument, took no part in the judgment.

Rule absolute to enter a verdict for defendant.

ALLEN ET AL. V. CHISHOLM.

Carriage by water—Agreement to pay shortage—Right to set it off against freight.

The plaintiffs agreed with defendants to carry 11,662 $\frac{3}{4}$ $\frac{0}{0}$ bushels of wheat from Toronto to Kingston, at 3 $\frac{3}{4}$ cents per bushel, the bill of lading being signed for the whole amount, and stipulating that the vessel was to deliver the quantity expressed or pay shortage. On the delivery to the consignees 181 bushels short, they, representing defendant whose interest in the wheat continued, refused to pay freight.

Held, that defendant was liable for the freight, and had no right to deduct his claim for shortage; such claim not being a liquidated demand so as to form the subject of set-off against the freight.

33 Vic. ch. 19, sec. 30, does not apply to cases between masters of vessels and owners of goods, but only between masters and consignees or endorsers for value.

DECLARATION.—First count: For money payable for freight, &c.

Second count: On a special agreement to carry 11,662 $\frac{3}{4}$ $\frac{0}{0}$ bushels of spring wheat from Toronto to the Port of Kingston, at the rate of 3 $\frac{3}{4}$ cents per bushel; and averring performance and non payment.

Third count: On a special agreement as to the carriage of the same wheat.

Pleas: 1, to first Count—excepting as to \$157, never indebted.

2. To second Count—that the plaintiffs did not carry to nor deliver at the Port of Kingston the said wheat.

3. To third Count—that defendant did not promise.

4. To third Count—that the plaintiffs did not carry and deliver the wheat, but made default; and that a large quantity of the said cargo, of greater value than the amount of freight demanded by the plaintiffs, had been withheld by the plaintiffs, who had neglected and refused to deliver the same.

5. To the whole declaration—except as to the sum of \$157, payment.

6. To the first Count—except as to the \$157, a set-off for goods bargained and sold, sold and delivered, &c.

7. As to the \$157, payment of that amount into Court.

Issue on the 1st, 2nd, 3rd, 4th, and 5th pleas.

Replication to the 6th plea—never indebted; and to the 7th plea—that \$157 is not sufficient to satisfy the plaintiffs as to the matters to which the same is pleaded. Issue.

The cause was tried at the Spring Assizes of 1872, at Toronto, before Hagarty, C. J., C. P.

John Allen, one of the plaintiffs, was called as a witness, and said he received the bill of lading from defendant. It specified that a quantity of 11,662 $\frac{3}{8}$ bushels of spring wheat was, on the 26th October, 1871, shipped in good order, for the defendant on board the schooner *Marysburg*, at Toronto, to be delivered at Kingston, at 3 $\frac{3}{4}$ cents per bushel. "Vessel to deliver quantity as expressed in bill of lading or pay shortage." He signed it. He supposed he had received the quantity mentioned. He was on board all the time, and he delivered all he received. He battened down the hatches, and went straight to Kingston. He delivered there to the consignees at a floating elevator.

In cross-examination, he said, the wheat was weighed when put on board, but they could not check the weights. The elevator people weighed it. The mate weighed it at Kingston, or checked the weights. There were 181 bushels short at Kingston. The consignees refused to pay

the freight. The agreement with defendant was, that the plaintiffs were to pay at the rate of one bushel per thousand for shortage. He could not see whether the wheat weighed at the elevator came down into the vessel.

David Forbester, the mate, said : He was at the elevator. The man there weighed the wheat, and called the weights ; the mate checked the weights as they were called. He could not see the wheat come from the hopper to the vessel. They battened down the hatches and did not open them till the elevator at Kingston came along side. They delivered all the wheat they got. He was present when the wheat was weighed at Kingston. He could see no fault. There was a sea on, and not much certainty in the way it was done. The Captain objected on account of the sea ; but they insisted on taking the wheat that day.

It also appeared that the consignees were the Bank of Toronto, Montreal, care Coulthurst & Macphie, Kingston.

Several objections were taken by the defendant's counsel : 1. That defendant was not liable for freight at all ; the consignees were liable ; the bill of landing expressed " the consignees paying freight and charges." 2. That the plaintiffs had not delivered the quantity they had received as alleged. 3. That the shortage, 181 bushels, at \$1.30 per bushel, was a good set-off.

It was admitted that the defendant's interest in the wheat continued after the delivery at Kingston.

It was agreed that a verdict should be taken for the plaintiffs for \$228.66 ; and that the defendant should have leave to move to enter a nonsuit on these objections.

The defendant had leave also to put any plea on the record to raise these defences, if the present pleas did not do so.

The verdict was rendered for the plaintiffs as above.

In Easter Term last, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside, and a verdict or nonsuit entered for the defendant, on the leave reserved ; or for a new trial, the verdict being contrary to law and evidence.

In Michaelmas Term last, *Patterson*, Q. C., showed cause.

The plaintiffs delivered all the wheat they got. There was, therefore, no shortage "To pay shortage," may perhaps mean that the plaintiffs are to pay whatever was short of the quantity expressed in the bill of lading, whether that quantity was or was not on board in fact; but however that may be, the claim for shortage is still a claim for unliquidated damages, and not the subject of a set-off, because it is not a debt. The cases are expressly in point; *Dakin v. Oxley*, 15 C. B. N. S. 646; *Meyer v. Dresser*, 16 C. B. N. S. 646. The defendant is liable for the freight. He was the owner at the time of shipment, and at the time of delivery at Kingston. The consignees there received the wheat for him.

M. C. Cameron, Q. C., supported the rule. The defendant was justified in deducting the shortage. The cases referred to by the plaintiff show as a rule that shortage is not the subject of a set-off. But in this case, by the express agreement in writing between the parties, the shortage was to be paid for. There is a specific quantity of shortage and at a particular price, so that the value of it is reduced to a certainty. The plaintiffs should not be allowed to dispute their own receipt, admitting they had got the quantity expressed in it: 33 Vic. ch. 19, O. As to the consignees being liable and not the defendant, he referred to *Lewis et al. v. McKee*, L. R. 2 Ex. 37. If the defendant's rights can be put in any form by amendment, so as to give him the benefit of them in this action, the Court is at liberty to make the amendment.

WILSON, J., delivered the judgment of the Court.

As to the liability of the defendant for the freight, he was the owner of the wheat, and shipped it to be delivered at Kingston to the consignees or assigns, they paying freight and charges.

The consignees were the Bank of Toronto, Montreal, care of Coulthurst & Macphie, Kingston. And the defendant's interest continued in the wheat after its delivery at Kingston.

Before the Imperial Act, 18 & 19 Vic. ch. 111, of which the Ontario Act 33 Vic. ch. 19, is a transcript, the shipper on such a bill of lading was always liable for the freight. But if the consignee accepted the goods and the captain of the ship delivered them to him, a new contract might be inferred to have been made between them, by reason of the delivery being made without the captain insisting on his lien being first satisfied: *Young et al. v. Moeller*, 5 E. & B. 755.

The Statute does not seem to have made any difference in the rights of parties in that respect. The consignee, although delivery is to be made to him on his paying freight, is not liable on the bill of lading for freight, but becomes so on an implied engagement to pay upon, and by reason of the delivery of the goods being made to him: *Chappel v. Comfort et al.*, 10 C. B. N. S. 802; *Smurthwaite v. Wilkins et al.*, 11 C. B. N. S. 842.

See also the Ontario Act, 33 Vic. 19, sec. 2,—“Nothing herein contained shall prejudice or affect * * any right to claim freight against the original shipper or owner, &c.”

The defendant did not pass the property to the consignees absolutely; he was still interested in it; and the consignees were, in effect, his agents only. So the defendant as principal was liable in that character also: *Lewis et al. v. McKee*, L. R. 2 Ex. 57; the same case, but not the same point, in the Ex. Ch. L. R. 4 Ex. 58.

The next question in point of order is, whether there can be a set-off in respect of the shortage.

That arises under the words of the bill of lading, “Vessel to deliver quantity, as expressed in bill of lading, or pay shortage.”

If the expression had been, “that shortage might be deducted,” the defendant might have pleaded a set-off; or he might equally have got the benefit of it as a deduction under the plea of never indebted: *Fisher v. Berry*, 16 C. P. 23.

It is not necessary the word *deduct* should have been used to constitute the right to set off or deduct. The

words "forfeit and pay," are sufficient: *Fletcher v. Dyche*, 2 T. R. 32; or the word "pay," alone: *Legge v. Harlock*, 12 Q. B. 1015.

But then the demand must be one of a liquidated nature.

In *Meyer v. Dresser*, 16 C. B. N. S. 646, and *Best et al. v. Hill*, L. R. 8 C. P. 10, a deduction or claim in the nature of a set-off, against freight for damaged or undelivered goods, is treated as a demand not liquidated, but as one for unliquidated damages.

An engagement by the shipper or owner of a vessel to pay for all damaged goods would not, I think, constitute that demand a debt or a liquidated sum.

Whether an engagement to pay for every horse out of twelve put on board, which was not delivered at the final destination, or for every bushel of wheat which was short at the port of delivery, would constitute such a debt, is the question.

If the price of the horse or of the wheat were fixed which was to be paid, it would be an ascertained and determinate sum, and the subject of a deduction or a set-off. But, in the absence of a fixed price, I doubt very much if the claim could be said to be liquidated,

If it were pleaded to an action brought for the freight, it would be necessary to set up the agreement giving the right to be paid for the deficient goods, and alleging the deficiency and their value, but that would be a demand for the wrongful loss or detention of the goods in effect, to be paid for under the express contract it is true, and at an unsettled price.

That sounds like a claim for unliquidated damages, and not for a debt.

It may be said a sale of goods which is sued upon under the count for goods sold and delivered, where no price has been agreed upon, is of the like uncertain character. The difference, I think, is obvious.

On the sale of goods, the purchaser becomes a debtor for so much money as they were worth, and they have at that time a settled market value; and the jury merely express

that market value, or, in other words, fix the price the defendant is to pay upon his contract of sale.

The relationship of debtor and creditor has been formed and exists between the parties.

In the case of lost or undelivered goods, the relation of debtor and creditor has not been formed. It is a special agreement to make good the loss, just as the parties agree it shall be made good.

If the agreement expressly gave the consignor or consignee the right and power to *deduct* the deficiency from the freight, of course it would be done: *Cleworth v. Pickford*, 7 M. & W. 314. And the amount of deduction would be made at the risk of the person making it, just as if a person were to make an affidavit of debt against a defendant, in order to arrest him, that he owed so much for goods sold delivered, when no price for them had been actually agreed upon; or just as in an apportionment of rent, when the landlord distrains for it as he claims it should be apportioned: 2 Inst. 503-4; *Vin. Abr.* "Apportionment" E. In all such cases, the party would act at his own risk.

I think this provision, that the vessel should deliver the quantity of wheat expressed in the bill of lading or pay shortage, does not confer the right on the person paying the freight to deduct or to set it off. It does not do so in terms, and in the absence of such an express agreement, it cannot be done under the present law; and the present decisions are much against the allowance of a set-off against freight, for obvious mercantile reasons: *Meyer v. Dresser*, 16 C. B. N. S. 646, 663.

It is not necessary to determine the other question, whether the plaintiffs are, or are not, bound by the instrument they have signed to deliver the specific quantity expressed in it; or are concluded by their agreement to deliver it or pay for the shortage from disputing that they actually got the whole amount which they have said they did. For, although they may be bound to account for the whole quantity they testified to have got, there can be no deduction or set-off made against it in this action.

33 Vic. chap. 19, sec. 3, O., does not apply between the master and owner of the goods. It is confined to cases between the master and a consignee or endorser for valuable consideration.

The liability of the plaintiffs on this document, depends upon the common law. It is properly a question for the jury. But the Judge would probably direct upon such evidence as was here given to find for the defendant: *Lewis et al. v. McKee*, L. R. 4 Ex. 58, 62.

There being no way in which an amendment can be of service to the defendant by equitable plea or otherwise—*Stimson v. Hall et al.*, 1 H. & N. 831—and the substantial questions having been determined against him, we must discharge the rule.

Rule discharged.

BATEMAN V. CITY OF HAMILTON.

City corporation—Negligent construction and obstruction of culvert—Action for.

In an action for negligently constructing a culvert under a public street, and altering drains so that more water was directed through said culvert than it could carry off, and for allowing the culvert to become obstructed, whereby plaintiff's premises were overflowed, &c., it appeared that the culvert, &c., had existed for twenty years, under a public street in the city, but it was not shown by or for whom it was made, nor when the obstruction of the culvert by mud and stones, &c., took place, nor that it had been brought to defendants' knowledge.
Held, that the plaintiff must fail.

THIS was an action on the case against the defendants.

The declaration set out that a certain water-course and drain extended and flowed into and through the lands of the plaintiff and other lands within the city of Hamilton, across a certain street of the defendants called East Market street, and thence through other lands, &c., and across other streets of the defendants, &c.; and that the defendants, undertook to drain and did in the manner hereafter mentioned drain away the surplus water, filth, &c., of and from a large portion of the said city adjacent to the premises of the plaintiff, and for such purpose

took and altered the drain and water-course running through the plaintiff's lands above where it entered his lands, and below the same, and altered other drains, &c., above and along East Market street, and made and constructed other drains in connection therewith, and in connection with the water-course, &c., passing through plaintiff's lands, so as to conduct and direct above and along East Market street, into those portions of the water-course which passed through the plaintiff's lands, above and below such lands, with greater rapidity and in increased volume while the flow thereof lasted, all the waters, filth, &c., of that portion of said city along and above East Market street, which would have naturally entered such drain and water-course, &c.; and also did conduct and direct into the water-course which passed through plaintiff's lands, above and below said lands, other large quantities of the waters, filth, &c., of that portion of the city of Hamilton which, neither in the natural course and flow thereof, nor unless and except by reason of the said sewerage works of the defendants, would have entered such water-course, passing through the plaintiff's premises; yet defendants, neglecting their duty and wrongfully intending to injure the plaintiff, &c., so negligently, unskilfully, and with such want of due and proper care conducted themselves in the construction, direction, continuance, keeping in repair, and management of all their sewerage works, above mentioned, and particularly in the construction, &c., of that portion situate along and adjacent to East Market street, and where the said drain or water-course crosses the said street, that by and through the means of the said negligent, &c., conduct of the defendants, &c., and their want of due and proper care, &c., large quantities of the said waters, filth, &c., were poured in, damned, raised, and thrown back into and upon the lands, cellar, bakery, &c., of the plaintiff, and continued and kept, &c., for a long space of time, and notwithstanding the defendants have always had full notice and knowledge, so as to greatly obstruct and injure the plaintiff in his trade, &c.

Pleas—1. Not guilty. 2. That there was not before or at the time, &c., a drain extending into, through, and from the premises of the plaintiff, whereby the plaintiff's premises ought to have been kept drained as alleged.

There was also an equitable plea, upon which nothing turned.

The cause was tried before Morrison, J., at the Hamilton Fall Assizes, 1871.

It appeared from the plaintiff's evidence, that a natural water-course or ravine crossed the plaintiff's land, where he had a house in which he lived and carried on the business of a bakery, and which house, &c., was built on the low ground in the ravine; and that below the plaintiff's premises, this water-course crossed East Market street through a culvert made under the street.

The plaintiff's witnesses testified that, during or immediately after freshets in the spring and fall, or a heavy thunder storm, they saw the water in the water-course obstructed at the entrance of this culvert, and so penned back on to the plaintiff's land, flooding his cellar, &c., and they gave it as their opinion that the culvert was not large enough to pass the water on such occasions, although quite large enough at other and ordinary times.

Some of the plaintiff's witnesses also stated that, according to their notions, more water was led to this natural water-course, and passed through this culvert, than naturally and formerly flowed into and through it.

There was also evidence that on the occasions of the water being penned back and obstructed, the culvert was partially stopped up by sticks, mud, &c., that came down with the water, as well as matter thrown into the water-course.

There was no evidence to show by whom the culvert was made; it was put in, or existed, as several witnesses said, over twenty years ago.

There was evidence, that in later years the street was graded, stoned, and repaired by the corporation officers.

From the plaintiff's own testimony, it appeared that in

the fall of 1862, the first overflowing of water and backing on to his premises occurred.

The evidence on the part of the defendants went to shew that no complaints, until recently before this action, were made as to this culvert or the drain, or the water-course: that formerly a larger quantity of water passed through the plaintiff's premises and this culvert, than during later years; that they examined the plaintiff's premises, and the premises of the various owners of land, through which the water-course ran above and below the culvert, and the fences across the water-course and drains, and the box culverts made through private grounds for passing the water that flowed down the same: that these fences obstructed the free flow of the water; and that such drain and box culverts obstructed and penned back the water to the culverts, on account of their being made with apertures insufficient to carry off the large volume of water during freshets and thunder storms; and these witnesses accounted in that way for the over-flowing of the plaintiff's premises.

The evidence of the City Engineer was very strong on these points. He further testified that, he heard of no complaints between 1856 and 1868 from the plaintiff: that, in his opinion, the culvert in question was properly constructed: that a larger culvert would not prevent the flooding: that the culvert was not the cause of the injuries complained of; and he attributed the complaints of the water being obstructed to a drain built by one Morris three or four years previous; saying that he thought if that drain had not been made, there would have been no complaints arising from the cause alleged by the plaintiff.

There was some evidence that the entrance to the culvert was obstructed or partly filled up with mud and matter, &c., carried down the water-course; but there was no evidence that the defendants had notice of such obstructions.

At the close of the plaintiff's case, the counsel for the defendants submitted that the plaintiff should be nonsuited, as there were no evidence establishing negligence or neg-

lect of duty by the defendants, or to support the plaintiff's declaration.

The learned Judge was of that opinion ; but he allowed the case to go the jury to settle the amount of damages, if any, reserving leave to defendants to move to enter a nonsuit.

The jury found for the plaintiff, \$300 damages.

In the following term, *Burton*, Q. C., obtained a rule to set aside the verdict and enter a nonsuit, pursuant to leave, or for a new trial, and for misdirection.

In Michaelmas Term, *R. Martin* shewed cause. He cited *The Company of Proprietors of the Southampton and Itchin Floating Bridge and Roads v. The Local Board of Health of Southampton*, 28 L. J. Q. B. 41; S. C. 8 E. & B. 801-803; *Reeves v. Corporation of the City of Toronto*, 21 U. C. R. 157; *Lawrence v. The Great Western Railway Company*, 16 Q. B. 643; *Harrold v. The Corporation of the County of Simcoe and the Corporation of the County of Ontario*, 16 C. P. 43; S. C. in App. 18 C. P. 9; *Alston v. Grant et al.*, 3 E. & B. 128-134; *Watson v. Perine et al.*, 13 C. P. 229, 233; *The Corporation of Wellington v. Wilson et al.*, 14 C. P. 299-304; *Brown v. The Municipal Council of Sarnia*, 11 U. C. R. 87; *Croft v. The Town Council of Peterborough*, 5 C. P. 35, 39; *Farrell v. The Mayor and Town Council of the Town of London*, 12 U. C. R. 343; *Rowe v. The Corporation of the Township of Rochester*, 29 U. C. R. 590; *Bagnal et al. v. The London and North-western Railway Company*, 31 L. J. Ex. 121.

M. C. Cameron, Q.C., and *Burton*, Q.C., contra. It is admitted that the defendants would be liable for negligence ; but there is no evidence of negligence in the construction of any work under their control. No negligence has been shewn in the construction of the sewer ; and as it has proved sufficient for twelve years, there can have been no negligence in its original construction. The question seems to be whether, the work having been sufficient at first for the purposes it was constructed for, the defendants are bound to alter it to meet circumstances as they change from time to time.

The defendants must be shewn to have violated some duty incumbent upon them under the Municipal Act, 1866, secs. 338, 339, and their liability must confine itself within the Act. There was no obligation on them to increase the size of the culvert. There was no evidence of assumption of the road, but if there were they would not be liable even then: *McGillivray v. Millen*, 27 U. C. R. 62; *Crewson v. Grand Trunk Railway Company*, *Ib.* 68. Several cases shew that the liability of corporations in such cases must be strictly construed: *Gibson v. v. The Mayor, Aldermen, and Burgesses of Preston*, L. R. 5 Q. B. 218; *Wilson v. The Mayor and Corporation of Halifax*, L. R. 3 Ex. 114; *Parsons v. The Vestry of St. Matthew, Bethnal Green*, L. R. 3 C. P. 56; *Carr et al. v. The Northern Liberties*, 35 Penn. 224. As to the evidence of negligence: *Giblin v. McMullen*, L. R. 2 P. C. 317-335; *Ryder v. Wombwell*, L. R. 4 Ex. 32; *Toomey v. The London, Brighton, and South Coast Railway Company*, 3 C. B. N. S. 146; *Hammack v. White*, 11 C. B. N. S. 558.

MORRISON, J.—This was an action against the defendants, the Corporation of the City of Hamilton, tried before me at the Hamilton Fall Assizes, 1871.

At the conclusion of the plaintiff's case, I was rather of opinion that he failed to establish any liability on the part of the defendants, but I did not like to stop the case, and allowed it to proceed with a view of settling the amount of damages, reserving leave to the defendants to move to enter a nonsuit.

The complaint of the plaintiff is, that the defendants, neglecting their duty, so negligently and unskilfully and with such want of due and proper care in the construction, direction, continuance, and keeping in repair, and management of their sewerage works, particularly in the construction, &c., of that portion of their sewerage works, viz, the culvert in question, that a large quantity of water was thrown back upon the premises of the plaintiff, &c.

The burden of proof was upon the plaintiff, to establish the allegations in his declaration, to shew that the injury complained of was attributable to the negligence of the defendants, or the neglect of some duty cast upon them.

It was incumbent on the plaintiff to shew affirmatively that the culvert in question, and the embankment through which it passed, were constructed or made by the defendants, and if so, that they constructed it with an insufficient opening or capacity, or otherwise in so defective or improper a manner, that it impeded the free flow of water passing down the natural ravine or water-course in question; or that they allowed it to be out of repair, obstructed, or improperly maintained, and so unfit for the purpose designed.

The testimony on the part of the plaintiff was very unsatisfactory, being generally statements of opinion.

No evidence was given that the defendants constructed the culvert, nor was there any evidence indicating by or for whom the culvert or embankment through which it passed was made.

It did appear that the streets in that part of the city were laid out many years ago by the private proprietors of the lands.

As to the culvert itself, the testimony only went to shew that it was constructed more than twenty years ago; but as I have remarked, by, or for whom, did not appear; and the evidence also shewed that, until recently, no complaints were made in respect of the culvert, and that it was formerly quite adequate for the passage of the water flowing down the ravine to the culvert.

It was, however, contended that the defendants being bound to keep East Market street in repair, under which this culvert passed, it was the duty of the defendants to keep the culvert free from all obstructions, and that they negligently permitted it to become choked and obstructed so as to impede the free passage and discharge of the water, and so caused it to set back on the plaintiff's premises.

Assuming that there was a duty cast upon the defendants to keep this culvert free from rubbish thrown into the ravine and carried down from time to time by the flow of water into the culvert—a point upon which I desire to express no opinion—the evidence at the trial failed to establish a case against the defendants upon that ground.

There was evidence given by one or more witnesses, that upon an inspection of the culvert, some time after the backing of the water to the plaintiff's premises, it was found partially obstructed by mud, &c., washed into it and partially by a coping stone which had fallen and lay at the entrance of it.

It did not appear, however, when the mud accumulated in the culvert or when the stone fell at its mouth. The mere existence of these obstructions was not in my opinion enough to establish negligence. There was no evidence that the defendants or their officers had any notice of these obstructions, nor did it appear that they were of so notorious a character or had continued so long as to charge the defendants with constructive notice of them.

It was also attempted to be shewn that the defendants diverted water into the ravine which would not have otherwise flowed into it, and so increased the volume of water beyond the capacity of the culvert to discharge it readily, and so in that way caused it to be penned back; but while some of the plaintiff's witnesses were of opinion that the defendants, by grading certain streets and providing channels for carrying the water of such streets, led water into the ravine; which would not have found its way into it, others thought such water would have naturally flowed into the ravine; but none of the plaintiff's witnesses would say that such diverted water increased the volume passing down to and through the culvert, and so caused the penning back of the water at the entrance of the culvert.

On the whole, there was no evidence given on the part of the plaintiff to connect the defendants with the construction of the culvert, or any interference with the ravine or flow of the water in it; that as to the obstruc-

tions assuming liability for the nonfeasance in that respect, there was no evidence that the defendants had notice or were aware of their existence.

I am, therefore, of opinion that the plaintiff failed in establishing the allegations in his declaration of any negligence or liability on the part of the defendants, and that the rule should be absolute for entering a nonsuit.

I have looked into the numerous cases referred to by Mr. *Martin*, but in all those cases the facts and circumstances are quite different and distinguishable from this case, most of them depending upon provisions to be found in various Acts of Parliament, passed in relation to the subject matter appearing in the different cases.

WILSON, J., concurred.

Rule absolute.

GROVES, (Assignee in Insolvency of OWEN [McMAHON] v. MCARDLE.

Insolvent Act of 1869—Estoppel—Finality of proceedings in Insolvency.

Declaration by plaintiff as assignee in Insolvency of McM., on the common counts.

Plea, that McM. was not a trader within the meaning of the Insolvent Act of 1869.

Replication by way of estoppel, setting out in full the proceedings and adjudication in the Insolvent Court, shewing that an attachment in Insolvency issued against McM., that he petitioned the Judge to set it aside on the ground, among others, that he was not a trader within the Act, that the Judge decided that he was a trader, and that such decision was affirmed on appeal by one of the Judges of the C. P.

Held, on demurrer, plea good; though the more formal plea would have been one denying that the plaintiff was assignee of McM. in manner and form, &c.

Held, also, replication bad, as such adjudication and proceedings were not conclusive, at all events as against a debtor of McM., but were subject to question in this Court.

DEMURRER.

Declaration—First count on the common counts, stating the causes of action to have accrued to the insolvent before his insolvency. Second count, for money had and

received, for interest, and on account stated, stating the causes of action with the plaintiff as assignee.

Fourth plea—That Owen McMahon was not a trader within the meaning of “the Insolvent Act of 1869,” nor was he subject to the provisions of the said Act.

Second replication to the fourth plea of the defendant by way of estoppel—That heretofore, and before and at the time of the making of the affidavit and issuing of the writ of attachment hereinafter mentioned, the said McMahon was a resident of the village of Port Dalhousie, in the county of Lincoln, and carried on business as a dealer in the buying and selling of tug steamboats, and was the owner of tug steamboats in the said county, and was engaged in the business of a tug owner: that he became indebted in such business to one Robert Laurie, of the town of St. Catharines, in the said county, flour merchant, and to others, in divers large sums of money, which he, the said McMahon, was unable to pay: that he permitted executions against him, under which certain of his goods were seized, to remain unsatisfied till within four days of the time fixed by the sheriff for the sale thereof, and for fifteen days after seizure as hereinafter mentioned: that he was indebted to Laurie in respect of the promissory note hereinafter next mentioned: that the said Laurie made affidavit before a commissioner duly authorized, that the defendant was indebted to him, Laurie, in the sum of \$201.04 on a promissory note—(setting out the note)—and that to the best of his, Laurie’s, knowledge and belief, the said McMahon was insolvent within the meaning of the Insolvent Act of 1869, and had rendered himself liable to have his estate placed in compulsory liquidation under the said Act, and that his reasons for so believing were the following: that he, the said McMahon, had permitted an execution against his goods and chattels in a certain suit in which one E. McArdle was plaintiff, and under which his said goods and chattels were seized and taken into execution by the sheriff of the said county, to remain unsatisfied till within four days of the time fixed by the sheriff of the

said county, for the sale of the said goods so seized ; and also had permitted an execution against his goods and chattels issued in a certain suit in which Timothy Sullivan was plaintiff, (setting it out as in the case of McArdle) to remain unsatisfied fifteen days after seizure of his goods thereunder, and also caused two credible persons (naming and describing them) to make affidavits of similar facts and circumstances before a commissioner duly authorized, and thereupon the said Laurie caused an application to be made to the county Judge of the said county for the issue of the writ of attachment hereinafter mentioned, and on the said application filed the said affidavits ; that the said Judge on the said application was satisfied by the facts and circumstances in the affidavits that McMahon was insolvent within the meaning of the said Act, and that his estate had become subject to compulsory liquidation, and ordered the issue of a writ of attachment in the form in the said Act provided against the estate of the said insolvent addressed to the sheriff of the said county, being the county in which the said writ issued, returnable as therein mentioned, requiring the said sheriff to seize and attach the estate and effects of the said insolvent, &c. : that the writ was delivered to the sheriff, who executed the same and summoned the said McMahon as by the writ was commanded ; that the plaintiff afterwards became and was duly appointed assignee of the estate and effects of the said insolvent : that the said insolvent, within three days of the return day of the said writ, as by law provided, presented a petition to the said Judge praying for the setting aside of the said writ of attachment, on the ground, among others, that the said insolvent was not a trader within the meaning of the said Act, and that his said estate had not become subject to compulsory liquidation : that such petition was afterwards heard by the said Judge, who, having considered all the evidence adduced before him, decided conformably to the said evidence, and determined that the said insolvent was before and at the time of the issuing of the said writ a

trader, within the meaning of the said Act; and that the estate of the said insolvent was before and at the time of the issuing of the said writ of attachment subject to compulsory liquidation, and dismissed the prayer of the said insolvent with costs: that the said insolvent afterwards appealed from the said decision of the said Judge to one of the Judges of the Court of Common Pleas; and the said last mentioned Judge having heard the said appeal, afterwards dismissed the same, and affirmed the decision of the County Judge of the said county. And this the plaintiff is ready to verify, &c.; therefore, the plaintiff submits that the defendant ought not, in this suit, to be allowed to plead that the said insolvent was not a trader within the meaning of the said Act, nor subject to the provisions thereof, and asks the judgment of the Court in the premises.

This plea was demurred to, on the grounds:—1. That the plea admits that the plaintiff is assignee in insolvency of the estate and effects of McMahon, and shews no reason why the plaintiff should not recover in this suit. 2. That such plea does not shew that the appointment of the plaintiff as such assignee has been in any manner vacated or made void, or the proceedings placing said McMahon's estate and effects in insolvency have been in any manner, at his instance or otherwise, vacated or made void. 3. That it is not open to a debtor of an insolvent, who, by a Court of competent jurisdiction or otherwise, has been adjudicated or become an insolvent within the meaning of "the Insolvent Act of 1869," to contest the validity of such adjudication or the status of the insolvent in a suit instituted for the recovery of a debt due by him to the insolvent at the time of the insolvency. 4. That the adjudication of a Court of Insolvency is in the nature of a decision *in rem*, and so long as unreversed fixes the status of the debtor and of his estate against all persons indebted to him at the time he became or was adjudicated insolvent.

The defendant joined in demurrer to the plea and demurred to the replication, on the grounds:—

That the replication sets up matter of evidence simply.

That it attempts to set up an estoppel by reciting proceedings to which the defendant was not a party.

That the plea alleges facts shewing that the Court in which insolvency proceedings were taken, being an inferior Court, had no jurisdiction, and the replication endeavours to defeat that plea by alleging as matter of estoppel the decision of the said Court as to its own jurisdiction.

That the facts stated in the said replication, do not sufficiently show that the said Owen McMahon was a trader within the meaning of the said Insolvent Act.

Joinder.

In this term the demurrer was argued.

Harrison, Q.C., for the plaintiff. The proceedings and adjudications in insolvency, and the affirmance of them in appeal, constitute an estoppel, as pleaded in this case, because they are in the nature of an adjudication *in rem*, a decision upon the status of McMahon, and that his estate was subject to compulsory liquidation: Insolvent Act of 1869, secs. 13, 26, 29, 40; *Duchess of Kingston's* case, 2 Sm. L. C. 699-750; *Bouchier et al. v. Taylor*, 4 Bro. P. C. 708; *Prosser, Administrator, v. Wagner et al.*, 1 C. B. N. S. 289; *Phillips v. Bury*, 2 T. R. 346; *Rex v. Grundon et al.*, Cowp. 315; 2 Co. Litt. 352 b.; *The King v. The Inhabitants of Hartington, Middle Quarter*, 4 E. & B. 780; *Cammell et al. v. Sewell et al.*, 3 H. & N. 617; S.C. in Ex. Ch. 5 H. & N. 728; *Simpson v. Fogo*, 29 L. J. Ch. 657, S. C. 32 L. J. Ch. 249; *Imrie et al. v. Castrique*, 8 C. B. N. S. 405; *Castrique v. Behrens*, 30 L. J. Q. B. 163; *Hobbs v. Henning*, 17 C. B. N. S. 791; *Taylor on Ev.*, vol. 2, sec. 1488; 6th ed. p. 1432.

In *Starkie on Ev.*, 4th ed. 401, it is shewn why the proceedings in bankruptcy should not be an estoppel was because the Commissioners did not decree as a Court of Judicature. Here we have a Court with complete machinery and ample power. The decisions of the Commissioners were not in the nature of decrees: *Bonham's Case*, 8 Co. 14; *Groenvelt v.*

Burwell, 1 Ld. Raym. 468; *Scott v. Thomas*, 6 C. & P. 611; *Butler v. Hobson*, 4 Bing. N. C. 290; *Rex v. Suddis*, 1 East 306; *Grant v. Gould*, 2 H. Bl. 69, 100; *Hannaford v. Hunn*, 2 C. & P. 148. The Imperial Acts 12 & 13 Vic. ch. 106, sec. 233, had, and 32 & 33 Vic. ch. 71, sec. 10, had clauses which gave a binding effect to bankruptcy proceedings. In *Revell v. Blake*, L. R. 7 C. P. 300, 310, the matter was very much discussed as to the effect of the present law in England. There is every reason why the conclusion of a Court should not be impeached. One Court should not allow facts to be said not to exist, upon the existence of which another Court has based its judgment. He referred also to *Regina v. Bolton*, 1 Q. B. 66; *Mould v. Williams*, 5 Q. B. 469; *Thompson v. Ingham*, 14 Q. B. 710; *Re Forster v. Forster et al.*, 4 B. & S. 187; *Ex parte Vaughan*, L. R. 2 Q. B. 114; *Re Elston v. Rose*, L. R. 4 Q. B. 4; *Regina v. Levi*, 34 L. J. Mag. Ca. 174; *Dredge v. Watson* 33 U. C. R. 165.

Assuming that the judgment of the Insolvent Court is not final, the replication at all events shews all that is necessary. It shews that McMahon was a trader, that he carried on a business of buying and selling: *Edgar's Insolvent Act of 1869*, pp. 34, 35. *Ex parte Gibbs*, 2 Rose 38; *Wright v. Bird*, 1 Price 20; *Heanny et al. v. Birch*, 3 Camp. 233; *Stuart v. Sloper*, 3 Ex. 700; *Harman v. Clarkson*, 22 C. P. 291. As to the quantum of trading, a single act is sufficient: *Stewart v. Ball*, 2 B. & P. N. R. 79; *Holroyd et al. v. Gwynne*, 2 Taunt. 176; *Gale v. Halfknight*, 3 Starkie 56; *Patman v. Vaughan*, 1 T. R. 572.

The case of *Stanton v. Austin et al.* L. R. 7 C. P. 651, shows that the pleading of a party will now be construed in order to maintain it, and not so as to defeat it.

McMichael, Q.C., contra. The case of *Revell v. Blake*, L. R. 7 C. P. 300, was a decision upon the special provisions of the English Statute. The validity of the insolvency proceedings can be questioned: *Fletcher et al. v. Manning*, 12 M. & W. 571; *Harrison v. Wright*, 13 M. & W. 816;

Re Elston v. Rose, L. R. 4 Q. B. 4; *Brown v. Cocking et al.*, L. R. 3 Q. B. 672. This plea is therefore a good plea. Does the replication shew any ground of estoppel? It is not a matter which took place between McMahon and the defendant, or between the plaintiff as assignee and the defendant, or to which the defendant was a party or privy in any way. It cannot operate *in rem*. It should set out the facts relied on as an estoppel with greater fulness. The petition did not state the facts which shewed McMahon was a trader. The Judge could not have decided that question, and his decision cannot be an estoppel. It is afterwards alleged that the Judge, on petition to him, decided that McMahon was a trader. It is not said he decided upon the evidence, but that having heard the evidence he decided the fact. *Shaw v. Massie* 21 C. P. 266. shews the fact of trader or no trader may be pleaded.

Trading means buying or selling in order to earn a livelihood: *Ex parte Cromwell*, 1 M. D. & DeG. 158.

The replication does not properly aver that McMahon bought and sold tug-boats.

He also referred to *Re Brown v. Cocking et al.*, L. R. 3 Q. B. 672; *Thompson v. Ingham*, 14 Q. B. 710; *Lee v. Rowley*, 8 E. & B. 857; *Christie v. Unwin et al.*, 11 A. & E. 373; *Muskett v. Drummond*, 10 B. & C. 153; *The Duke of Buccleugh v. Metropolitan Board of Works*, L. R. 3 Ex. 306, 324. The Court referred to sec. 144 of the Insolvent Act.

Harrison, Q.C., in reply. The affidavit of debt on which the writ of attachment issued is given in schedule F. of the Act. It is the same as that to the Act of 1864.

WILSON, J., delivered the judgment of the Court.

The decisions under the English bankruptcy laws have been uniform from the earliest time, that the proceedings taken under them are not conclusive, but are enquirable into.

In *Bonham's* case, 8 Co. 121a, it is said, "For although they have letters patent and an Act of Parliament, yet

because the party grieved has no other remedy, neither by writ of error or otherwise, and they are not made Judges, nor a Court given them, but have an authority only to do it, the cause of their commitment only is traversable in an action of false imprisonment brought against them; as upon the statute of bankrupts their warrant is under the Great Seal and by Act of Parliament; yet because the party grieved has no other remedy, if the Commissioners do not pursue the Act and their commission, he shall traverse, that he was not a bankrupt, although the Commissioners affirm him to be one." *Phillips v. Bury*, 4 Mod. 106-116, is to the same effect.

In *Bambridge v. Bates et al.*, Sir T. Ray, 337, it is said, "In the case of bankrupts, although the Commissioners have sole authority to adjudge a man bankrupt, yet in an action the jury must find whether he was a bankrupt or no, and not barely by the adjudication of the Commissioners."

In *Miller v. Seare*, 2 W. Bl. 1141, a good deal is said to the effect that Commissioners of bankrupts are liable to have the validity of their proceedings called in question, because they are not a Court; they have no judicial power, and are not judges of record; their office is chiefly executory and ministerial. A better reason is however given at p. 1145, where the Chief Justice said, "In Courts of special and limited jurisdiction, a distinction must be made. * * While acting within the line of their authority they are protected as to errors in judgment; otherwise they are not protected. So in Dr. Bonham's case false imprisonment lay, because they had exceeded their authority. In Dr. Groenvelt's it did not lie because they were within their jurisdiction. * * * The protection in regard to the Superior Courts is absolute and universal; with respect to the Inferior, it is only while they act within their jurisdiction"

And that is the ground on which the decision of *Doswell v. Impey*, 1 B. & C. 163, 169, is based, and also *Regina v. Bolton*, 1 Q. B. 66.

Just as the order of a Judge of one of the Superior

Courts was held to be void in an interpleader matter, where he decided the claim himself, but the order did not specify it was done by the consent of parties, the consent being the very ground of his jurisdiction: *Harrison v. Wright*, 13 M. & W. 816. See also *Christie v. Unwin et al.*, 11 A. & E. 373.

By the Imperial Act 1 & 2 Wm. IV. ch. 56, a "Court of Bankruptcy" was established, with all the rights, &c., of a Court of Record, as fully as the same are exercised by any of the Courts of Law at Westminster. That condition of things continued until, and was continued by the 12 & 13 Vic. ch. 106.

Notwithstanding the Commissioners constituted a Court of Record, the same rule still continued. The bankruptcy proceedings might be tried and traversed in an action at law: *Fletcher et al. v. Manning*, 12 M. & W. 157.

In *Butler v. Hobson*, 4 Bing. N. C. 290, the defendant pleaded that the plaintiff was not assignee, and it was held that under that issue the plaintiff must prove the petitioning creditor's debt and the act of bankruptcy. See also *Lee v. Rowley*, 8 E. & B. 857.

The statute of 49 Geo. III. ch. 121, required notice to be given when it was intended to dispute the proceedings in bankruptcy, which provision was continued and embodied in the 12 & 13 Vic. ch. 106, sec. 234, and it may have been continued later, which shews that the like effect and no greater has been given to the proceedings in bankruptcy since the Court of Bankruptcy has been established, which was given to them while everything was done under the authority of the Commission.

The proceedings are conclusive as against the bankrupt, unless he dispute them within a specified time: 12 & 13 Vic. ch. 106, sec. 233; 6 Geo. IV. ch. 16, sec. 92; *Reg. v. Levi*, 34 L. J. Mag. Cas. 174: S. C. 11 Jur. N. S. 450.

Very great amendments have been made by the 32 & 33 Vic. ch. 71, as Byles, J., said in *Revell v. Blake*, L. R. 7 C. P. at p. 314, "to supersede the old expensive enquiries at

nisi prius as to petitioning creditors' debt, trading, and act of bankruptcy, by making the order of adjudication conclusive evidence of those essentials."

That case shews, I think, that if the statute then under consideration had applied to traders only, or that there were certain fundamental distinctions between a trader and a non-trader who was adjudicated a bankrupt, it would have been open to the party contesting such proceeding to raise the question of jurisdiction.

The cases of *Watson v. Bodell*, 14 M. & W. 57; *Thompson v. Ingham*, 14 Q. B. 710; *Imrie v. Castrigue*, 8 C. B. N. S. 405; *Hobbs v. Henning*, 17 C. B. N. S. 791; *Re Elston v. Rose*, L. R. 4 Q. B. 4, are all cases in which jurisdiction generally of different Courts, has been questioned and considered.

In *Moss v. Smith*, 1 Camp. 489, the Commission failed, because there was no debt due to the petitioning creditor when the act of bankruptcy was committed.

In *Perkin v. Proctor et al.* 2 Wils. 382, trespass was brought against the assignees in bankruptcy, by a person who was not within the operation of the statute, the Court said, "We are all of opinion the commission of bankruptcy is void and is of no avail. The jurisdiction concerning bankrupts is confined to particular persons and cases—as that the person subject to a commission must be a trader, must be indebted in such a sum, must do some particular act, &c." See also *Summersett v. Jarvis et al.*, 3 B. & B. 2; *Heane v. Rogers et al.*, 9 B. & C. 577.

One of the principal illustrations of the rule relating to *de injuriâ* referred to this very point. It was held, to a plea for maliciously suing out a commission of bankruptcy, that the plaintiff was a trader, that he owed the petitioning creditor's debt, and that he became bankrupt, could all be traversed by the general replication, *de injuriâ*, because all three matters formed but the one defence: *O'Brien v. Saxon*, 2 B. & C. 98.

So that we have had in every way the general undisturbed impression that these matters were always disputa-

ble in an action at law, and that there was no estoppel created by the adjudication of them in bankruptcy or in insolvency, either in England or in this country. And the reason of it, we always understood to be, was, that the Court or authority was one of only a limited and defined nature, and its jurisdiction must, according to the rule in such cases, be averred and shewn, and is not to be presumed.

The Insolvent Act of 1869 is an Act which applies "to traders only."

The 20th section provides, that if the claimant, by affidavit, shews to the satisfaction of the Judge of the County Court that he is a creditor of the insolvent for a sum not less than \$200, and also shews, by the affidavit of two persons, such facts and circumstances as satisfy the Judge that the debtor is insolvent within the meaning of the Act, and that his estate has become subject to compulsory liquidation, the Judge may order the writ of attachment to issue.

By the 26th section the debtor may petition the Judge, within three days after the return of the writ, but not afterwards, to set aside the attachment, but proceedings for compulsory liquidation shall not be contested, either as to form or upon the merits, otherwise than by a summary petition in the manner, upon the grounds, and within the delay therein provided.

The 50th section also confers very great powers on the Judge and Court in dealing with the estates under liquidation.

The 144th section provides that, "After the expiration of one year from the appointment of an assignee, no suit or proceeding shall be instituted or commenced for the setting aside of any act or proceeding preliminary to such appointment, or of such appointment; nor shall any such appointment or the proceedings preliminary thereto be impeached, or the validity thereof be put in issue by any pleading in any suit or proceeding; but after the expiration of said period as to all persons not previously contesting the same, and until set aside by the decision of a Court of Law or of Equity, upon a pre-

vious contestation thereof, such appointment and the proceedings preliminary thereto shall be conclusively presumed to be valid and sufficient."

This last section, by the qualifying words as to "all persons not previously contesting the same," shews that it cannot apply to persons such as debtors of the insolvent, who could not contest such proceedings; and there is no other enactment which can be held to deny the right to a debtor, when he is sued by the assignee, to allege that the claim sued for never passed to the plaintiff, because the person said to have been made an insolvent was not a trader, and so not within the operation of the statute.

We think the fourth plea a good plea in substance, although the more formal plea would have been a plea denying that the plaintiff was assignee of the estate of Owen McMahon in manner and form as alleged.

That plea would have compelled the plaintiff to prove the necessary preliminary proceedings which conferred upon him the office of assignee, and among them that Owen McMahon was a trader: *Butler v. Hobson*, 4 Bing. N. C. 290.

Many of the matters set out in the replication are not properly used as an estoppel, although the writ of attachment and adjudication were based upon them. We refer to the judgment in *Hobbs v. Henning*, 17 C. B. N. S. 791, at pp. 826, 827.

There must be judgment for the defendant, for the insufficiency of the replication, and on the demurrer to the plea.

Judgment for defendant.

TAYLOR V. CAMPBELL, POSTMASTER-GENERAL.

*Contracts for parliamentary and departmental printing—Construction of—
Special case.*

On the 2nd of July, 1869, the plaintiff contracted with one H. as Clerk of the Joint Committee of both Houses of Parliament, to do the printing, &c., for both Houses at scheduled prices. On the 7th of October, 1869, the plaintiff contracted with Her Majesty for all the printing required for the several departments, to be specified in requisitions to be made upon him by the departments respectively, including the Postmaster-General's, department at scheduled prices; which were lower than under the first contract, and so tendered for as alleged by plaintiff, because he expected, in cases where similar matter was required under both contracts, to use the type set to fulfil one for the other. When the contracts were entered into the custom was for the annual reports of the heads of departments to be printed on the order of, and paid for by such departments, and the copies required for Parliament were ordered and paid for separately through the Clerk of the Joint Committee on Printing; but afterwards, by resolution of the Committee, concurred in by the House, it was directed that the annual reports should be printed on the order of the committee, under the first contract, including a sufficient number for the use of the departments, with which the departments should be charged.

The reports of the Postmaster-General having been thus ordered and printed, the plaintiff claimed to charge for the extra number required for the department under the second contract, and for the composition as though re-set for the department. *Held*, that he had no such right.

Quere, whether such an action would lie against the Postmaster General and as to the propriety of asking the Court to pronounce an opinion.

The Court should not be asked, upon a case stated without pleadings, to answer questions which could not be raised upon proper pleadings.

SPECIAL CASE, stated without pleading. The case was stated at considerable length but the following is sufficient for the judgment of the Court.

The action is brought by the plaintiff, who is a printer, against the defendant, who is the Head of the Post Office Department for the Dominion, under the following circumstances: On the 2nd of July, 1869, the plaintiff entered into a contract with Mr. Hartney, in the capacity of Clerk of the Joint Committee of both Houses of Parliament, whereby the plaintiff agreed to perform all the work, and furnish all the materials for the service of both Houses of Parliament, mentioned in a schedule and specifications annexed to the contract, at the times and within the period and upon the terms and conditions therein specified, during a term of five years, from the 1st of January, 1870. The plaintiff was to be paid for the work and materials performed for, and furnished to both respective Houses of Parliament, at the prices in the specification mentioned.

On the 1st of October, 1869, the plaintiff entered into a contract with Her Majesty, under the provisions of 32 & 33 Vic., ch. 7, Dom., respecting the Queen's Printer, by which contract the plaintiff agreed that during the term of five years he would perform and execute all jobs or lots of printing for the several departments of the Government of Canada of reports, pamphlets, &c., of every description and kind coming within the denomination of departmental printing, and all the work and services connected with and appertaining thereto, in such numbers and such quantities as might be specified in the several requisitions which might be made upon him for that purpose, from time to time, by and on behalf of the said several departments; he, the contractor, being in all cases furnished with the necessary supplies of paper. Such jobs or lots of work to be delivered to the several departments within a reasonable time after the receipt of the requisitions therefor.

In the schedule attached to these contracts were the prices to be paid for composition, so much per 1,000 ems, and for press work, &c. It also appeared by the case, that on the 20th March, 1870, the Chairman of the Joint Committee on Printing brought under the notice of the Committee the danger of double charges being made for Parliamentary and Government work when printed from the same edition, when it was resolved that the Chairman and Mr. McDonald should be appointed to wait on the Secretary of State to bring the matter under his notice, that arrangements might be entered into with the Government to prevent such double charges being made.

And on the 8th of April, 1870, the Committee passed the following resolution: "*Resolved*, that Parliament having entered into contracts for the printing services of Parliament, and the Executive Government having, under the statute of the last session, likewise entered into contracts for the printing required by the several departments, and the said several contracts having been awarded to the same person, who now contends that under his two contracts he has a right to double charges for all printing that he may execute

for the joint use of the Government and Parliament when such documents are ordered by the Government for departmental use—that is, being paid twice for the one composition, which is not only contrary to custom, but to the spirit and intention of the Parliamentary contract, and which, if allowed, must apply to every document, &c., printed by Parliament; as, by the distribution list, thirteen copies of all the votes, bills, documents, &c., are for the use of the departments of the Privy Council, besides several copies for every other department in the service, the practical effect of which would be, as exemplified in an account submitted to this committee for printing the report of the Public Works department, which, under the Parliamentary contract, amounts to \$208.83, for 1,870 copies, but which was also charged under the departmental contract, in addition, \$175.02½ for 500 copies, making the total \$383.85½, being \$120.35½ more than if the whole had been printed under Parliamentary contract, which system, if not checked, will cause great loss to the public; and that the Government now, as heretofore, can obtain from the contractor for Parliamentary printing as many extra copies of any documents being printed as they may require for their own use without other charge than the press work and paper, though the two contracts are held by the one person; and for the purpose of defining the separate contracts, it be held that all bills, reports, or documents submitted to Parliament either in manuscript or print are Parliamentary documents, whether the copy has been sent to the printer either by the departments or by Parliament, as the public service may require, and to bear the imprint of the contractor as the ‘Parliamentary Printer,’ and to be paid for at Parliamentary rates, after being checked and certified as according to contract by the Clerk of the Committee; and that departmental work shall bear the imprint of the contractor as ‘Departmental Printer,’ and be paid for at departmental rates, after being checked and certified as according to contract by Queen’s Printer. And further, *Resolved*, That should the Government or any department

thereof at any time require more than the usual number of copies of any documents which they now get under the distribution list, they do notify the Clerk of the Printing Committee in writing to that effect in sufficient time, that he may add such extra number to the distribution list."

And the Secretary of State was notified of the same, and that the resolution should be reported to the House of Commons; and on the 22nd of April, 1870, the Joint Committee passed the following resolution:

"That the contractor for the printing of Parliament being also a contractor for other public printing, it is expedient, in order to avoid errors, to resolve:

"That the Committee are of opinion, that all papers and documents ordered to be printed by Parliament are subject to the terms of contract entered into between Parliament and the contractor for the Parliamentary printing; and that the annual reports from the heads of the several departments are clearly comprised within the Parliamentary printing, as documents to be submitted to Parliament; and also, that it is within the power of Parliament to order under its contract such number of copies of the above as may be required for the public service; and, to prevent any misunderstanding, it be requested that the heads of the several departments do communicate to this Committee what number of printed copies of their several reports or other Parliamentary documents they may respectively require, that such number may be added to and form part of the Parliamentary distribution list," which resolution was reported to the House of Commons, on the 27th of April, 1870, and concurred in.

The case also stated that when the plaintiff entered into the contracts, annual reports of the heads of the departments had been always printed on the order of such heads, and paid for by such departments, and separated from those printed for the use of Parliament, and separately paid for through the Clerk of the Joint Committee on Printing.

That for some time after the plaintiff entered into his

contracts, he was paid for the printing of the annual reports for the departments for the number required for the use of the departments under his contract of the 1st of October, 1869, and for those required for the use of Parliament under the contract made with Mr. Hartney, as if they had been printed by two separate and distinct persons—the matter as stated having been deemed right and just by the then Queen's Printer, according to the custom and terms of the contracts.

That after the report of the 22nd of April, 1870, was concurred in by the House of Commons, the extra number of reports of the several departments, required for the use of the departments, were ordered by the Clerk of the Joint Committee on Printing, and charged for to the said several departments by the said Committee as Parliamentary printing, and paid for at the tariff rate under the Parliamentary contract, the payment however being made, not by Parliament, but by the respective departments.

The plaintiff claimed that when he entered into his said several contracts, he had reason to believe that the contracts were separate, and that the reports for the several departments would be paid for separately from those ordered and required for distribution of Parliament.

No question was raised as to the liability or non-liability of the defendant, on the ground that he is a public servant acting for Her Majesty the Queen.

The only question, for the opinion of the Court was, as stated in the case. "Whether the plaintiff, under his contract for departmental printing, is or is not entitled to be paid for 'all jobs or lots of printing for the several departments of the Government of Canada, of reports, pamphlets, circulars, and blank forms of every description and kind soever coming within the denomination of departmental printing, and all the work and services connected with and appertaining thereto,' under the terms of his said contract, when required for the use of the several departments, apart from those required under the Parliamentary contract, which is restricted to 'all printing required for the service

of both Houses of Parliament only,'—that is to say, whether, having reference to the two contracts, the plaintiff is authorized to charge for 'printing' and 'composition,' &c., of the departmental reports, &c., against Parliament on the Parliamentary contract and tariff, and also to charge for the same work in so far as copies thereof may be required by the departments (under order of the Printing Committee) on the departmental contract and tariff."

If the Court should be of opinion in the affirmative, then judgment to be entered for the plaintiff for \$1,623.02; if in the negative, judgment to be entered for the defendant.

Harrison, Q. C., for the plaintiff. The first contract, which was that for Parliamentary printing, was entered into with the plaintiff before 32-33 Vic., ch. 7, D., was assented to. That Act related to the office of Queen's Printer, and not to departmental printing, and under it the second contract with the plaintiff, to do the departmental printing, was entered into, in which the prices for composition and printing were lower than in the other. Previous to the Act the contracts had been held by different people wholly independent of each other. Under each of those two contracts the plaintiff had a right to be treated as a different individual, and, in the event of the same matter being required both in the departments and the Parliament, to be paid by both for composition, though he only set up the type once. It was just as if another person had been Queen's Printer and the plaintiff Parliamentary Printer. In that case the plaintiff could borrow the type set up by the Queen's Printer, and charge for the setting, and so could the Queen's Printer. Here the plaintiff occupied both places and their consequent rights and emoluments. The departmental contract was entered into at a low price, because the plaintiff thought he could use the type set up for the House. The paymasters were different, and that is a fact to show that the contracts were to be treated as distinct.

R. M. Fleming, for the Attorney-General of the Dominion. There is nothing in the contract to give the plaintiff the right to any charge for composition which he did not earn. The plan adopted by the Joint Committee of both Houses was to order when necessary a greater number to be printed than was needed for the House, such extra copies being for use in the departments; and this plan they had a perfect right to adopt. [RICHARDS, C. J. How is the sum claimed here made up?] It is the price of composition on an extra number of reports ordered by the Parliament for the use of the departments. The plaintiff was not the judge of how many copies were to be required, nor how they were to be disposed of, nor interested in their ultimate destination. He was bound to furnish as many copies as the Parliament ordered, at the contract price. [RICHARDS, C. J. Is there no specification as to the number, because it might be a loss to be ordered to print only one hundred copies?] He complains of doing too much, not of being ordered to print too little. There is but one paymaster, the country. No work has been done under the second contract, and therefore no claim can be made under it.

MORRISON, J., delivered the judgment of the Court.

We are of opinion, upon the case presented to us, that the defendant is entitled to our judgment. The plaintiff, by his contract of the 1st of October, 1869, undertakes to perform and execute all jobs and lots of printing, for the several departments of the Government, of reports, &c., within the denomination of departmental printing, as might be specified in requisitions made upon him for that purpose from time to time on behalf of the respective departments, the Government furnishing the paper for the printing of such jobs. Now it seems to me very clear, irrespective of the contract entered into by the plaintiff on behalf of the Houses of Parliament, that if the Postmaster-General's Department, or any other department, for any reason whatsoever, dispensed with the printing of any report or document, annual or otherwise, merely transmitting it in

writing to the House of Parliament, that this plaintiff could not in such a case have any pretence to charge for the price of the composition of a report he was not required to print.

The Post Office Department—whatever expectations the plaintiff may have had when he entered into his contract of the 1st October, 1869—were, we think, at perfect liberty to change their practice and system, and to say and determine what documents should be printed or not printed for the use of the department, or for distribution.

Before the plaintiff could execute any printing for a department or make any charge, a requisition, stating the matter to be printed, had to be addressed to the plaintiff, and also the paper furnished to him for that purpose. There is no provision in the contract of the 1st of October, limiting the extent of the work to be done, or for fixing any minimum quantity, or for making any compensation to the plaintiff should the practice of the departments be changed so as to dispense with a large quantity of the then usual printing. The contract only applies to such printing as the plaintiff may by requisition be directed to execute. No doubt the plaintiff is entitled to have the benefit of performing all departmental printing, but beyond that he has no claim.

It may be true, as stated on the argument, and it is not unreasonable to assume, that when the plaintiff made his tenders upon which his contract is based, he did so tender upon the expectation that certain reports, &c., theretofore annually printed by the departments, would be continued to be so printed. The Joint Committee on Printing however, having thought it expedient in the interests of the public to adopt a new system, and put an end to the printing of departmental reports intended to be laid before Parliament by the departments, and directing that such reports be printed by the Parliamentary Printer—by such change of system the plaintiff may be deprived of work and profits which he otherwise would have under his contract of the 1st of October.

That circumstance may entitle the plaintiff to some consideration at the hands of the Government, if his claim is a meritorious one, but it cannot entitle him in point of law to recover or be remunerated for work not required of him to be performed and never executed.

It was pressed upon us that the plaintiff having entered upon his contract of the 2nd of July, 1869, to perform all the printing of both Houses of Parliament, that we should consider that contract and the contract of the 1st October, 1869, as being entered into by two distinct persons having no interest in the other's contract: that under the contract of the 1st October, the practice adopted by the Government was to print for the Post Office Department its annual report (and so in the other departments their annual reports), and that after such report was so printed it was laid before Parliament and was again printed for the use of the Houses of Parliament, and such printings paid for under the respective contracts of the 1st October and 2nd July, as if the contractor (the plaintiff) was two distinct persons; and, as stated in the case, that practice was deemed right and just by the Queen's Printer, and according to the custom and terms of the contract—in other words, that the plaintiff having printed the report for the department, charged for the composition of it under the schedule of prices of the contract of the 1st of October, and being aware, as Parliamentary Printer, that he would be required to print the same report for the Houses of Parliament, he did not distribute his type, and from the same forms struck off the number of copies required for the use of Parliament, charging for composition under the contract of the 2nd July, as if he had distributed the type and reset it, and so, being both Parliamentary and departmental printer, he was entitled under his contract to charge for double composition and printing.

The plaintiff contended that a mere change of system for the distribution of the reports ought not to deprive him of such profits.

If the plaintiff had performed these separate works upon

distinct requisitions and orders from the department and the Clerk of the Joint Committee, the plaintiff might, strictly speaking, be entitled to be paid for such printing, including double composition, according to the schedules of prices in each contract, it being a matter of no moment to the parties how or in what manner the work was performed, if performed, whether the type was set up twice or retained in form; but when we look at the action of the Joint Committee, the case assumes quite a different aspect.

The Joint Committee, bearing in mind that the moneys paid under both contracts were charged upon the public purse, and considering it an unnecessary proceeding that the departmental reports should be printed twice when one printing, with an increased number of copies, would suffice, were moved to adopt their report of the 22nd of April, concurred in by the House of Commons on the 27th of April. It appears that after that date the copies of the annual reports required for the use of the Government departments were included in the order for printing given by the Clerk of the Joint Committee, under the plaintiff's contract of the 2nd of July, and charged for by the plaintiff at the schedule prices under that contract. The Clerk, it appears, charged the extra copies sent to the department to the respective departments, and the Government or department paid the amount so charged to the plaintiff.

It was argued that that mode of paying for the work showed that these copies were still within the term of departmental printing, and that the plaintiff was entitled to the same profits and advantages as if he had printed the report for the department. We think not. The charging by Mr. Hartney was a mere matter of keeping accounts, for distinguishing the expenses applicable to the departments and to the Houses of Parliament. The money came from the same chest, but through a different officer, and it was paid to the plaintiff as under his contract of the 2nd of July.

We must assume, after the 27th of April, as the contrary

does not appear in the case, that the Post Office Department made no requisition upon the plaintiff for the printing of its annual report to be submitted to Parliament; and in that case, and upon that ground, the plaintiff fails to establish any claim to make any charge against the department under his contract of the 1st of October in respect to such annual report.

I may here remark that if the Government had, with a view to economy, required the plaintiff under his contract of the 1st of October to print the annual reports of the departments, and at the same time to furnish a number of copies sufficient for the use of both Houses of Parliament, in such case it would hardly be contended that the plaintiff nevertheless would be entitled to make a charge against the Joint Committee for composition.

The plaintiff contends that when he entered into the contract of the 1st of October, he had reason to believe that he would be entitled to charge against the department what he now seeks to recover. If such was the understanding, it should have been embodied in the contract. The probability is, that if such a provision had been suggested, or one for giving compensation if any department dispensed with the printing of documents to be laid before the Parliament, the plaintiff would have been told that such a provision was inadmissible; in other words, that he could not be paid for work he was not required to perform, and did not execute.

On the whole case, we are of opinion that the plaintiff is not entitled to charge or recover against the defendant under his contract of the 1st of October, 1869, for the composition or printing of departmental reports laid before Parliament, and ordered to be printed by the Clerk of the Joint Committee on Printing for both Houses of Parliament, and for the use of the Departments; and that judgment be entered for the defendant.

No objection was taken to the plaintiff's right to maintain such an action under any circumstances against the Post Master General upon the contract of the 1st October. We express no opinion upon the point.

Through a special case we ought not to be asked to answer a question, unless it relates to matter for which an action would lie, or when the question itself could not be raised upon proper pleadings. Upon considering this case, it rather presented itself as one where the Court was asked to give advice, rather than to act judicially; or, as said by Martin, B., in *Nixon v. Albion Marine Ins. Company*, L. R. 2 Ex. 340; "in reality to decide upon an imaginary cause of action." We make these remarks so that this decision may not be referred to as an authority or precedent for any like proceeding. I refer to the cases *Doe d. Duntze v. Duntze*, 6 C. B. 100, and *Lord Wellesley v. Withers*, 4 E. & B. 759.

Judgment for defendant.

HAMILTON ET AL V. MOORE.

Building contract—Default of owner to have works ready for contractor—Want of averment of readiness to go on by contractor—Pleading.

Declaration on common counts for work and labor, &c., (being certain iron work on an unfinished building.)

Plea, as to \$1,207, that the work was done under an agreement, by a provision in which defendant had a right to deduct \$50 per week for every week after 1st July, 1871, the work remained unfinished; that it remained unfinished twenty-four weeks and one day, whereby defendant became entitled to deduct from the contract price \$1,207.

Replication, that defendant had not the buildings ready for the plaintiffs to do their work, without averring that the plaintiffs were ready and willing to complete it in time.

Held, on demurrer, replication good.

Seemle, that it would have been necessary to aver such readiness by the plaintiff, if the action had been on the contract for not allowing plaintiff to proceed with the work, &c.

DECLARATION on the common counts for work and labor, &c.

Third plea: as to \$1,207, parcel of the money claimed by the plaintiffs, that the claim of the plaintiffs is for work done and materials provided by the plaintiffs for the defendant under an agreement in writing between them, bearing date the 31st of May, 1871, whereby the plaintiffs, in consideration of \$3,025, to be paid by the defendant to the plaintiffs as in the said agreement specified, agreed with

the defendant to do all and singular the following work, and furnish the materials therefor, that is to say: two hoisting machines complete; wrought iron railing on the roof; certain cast iron columns; wrought iron for side-walks, including gratings, bars, bolts, &c.; and also certain other cast iron works, and basement columns and other works, fixing the same as works required in the erection of a certain warehouse building on Wellington street, in Toronto; the said works being set forth and detailed in certain plans, &c.; and the plaintiffs by the said agreement, agreed to furnish and complete the said works on or before the 1st of July, 1871, under a forfeiture of \$50 as liquidated damages for every week the said work should remain unfinished after the said first day of July; and the defendant, according to the terms of the said agreement, was only to pay to the plaintiffs the said sum of \$3,025, subject to any deduction for the nonfulfilment by the plaintiffs of the terms of the said agreement, or any part thereof. And the defendant says that the plaintiffs in violation of their said agreement, and without any default of the defendant, did not complete the said works by the said 1st day of July, nor for the space of twenty-four weeks and one day thereafter, to wit, the 16th of December, 1871, which said last mentioned day was before the commencement of this suit, whereby the defendant, under and according to the said agreement, became and was and is entitled to pay himself, and deduct, and does accordingly pay himself and deduct out of the moneys claimed to be due by the plaintiffs, the sum of \$50 for each and every week from the said first day of July to the said 16th of December, 1871, being in all the said sum of \$1,207.

Replication—That the said work and machinery in the said plea mentioned, were by the said contract to be put up in a certain building of the defendant, which was not at the time of the making of the said contract erected and built, but which was thereafter to be built and completed by the defendant; and that the said

building was not on the said first day of July, or at any time before that day, sufficiently advanced in the progress of the work thereof to permit the putting up and completion of the said works of the plaintiffs according to the terms of the said contract; and so the plaintiffs say, that on and long after the said 1st day of July, it was impossible for the plaintiffs to complete their contract, by reason of the unfinished state of the defendant's buildings and of the work to be done thereon by the defendant, his agents, workmen, or contractors, over which the plaintiffs had no control, and without which the said contract of the plaintiffs could not be fulfilled.

This replication was demurred to on the grounds—1. That it did not state or disclose that the plaintiffs were ready and willing, or offered to perform their contract as set forth in the said third plea, by the said 1st day of July, and were prevented from so doing by the defendant; or that the plaintiffs were prevented at all by the defendant from performing their said contract. 2. That the replication did not state that the defendant contracted by the said contract or any other, to build or construct the said building, or to have the same sufficiently advanced by the said first day of July to receive the iron and work to be applied thereto or done thereon by the plaintiffs.

Joinder.

During this term, *Ferguson* argued the demurrer for the defendant. The main objection to the replication is, that it does not contain an averment of the plaintiffs having been ready and willing to do their contract work by the 1st day of July, 1871. As they were not ready and willing, they can claim no benefit because the defendants had not the work in sufficient readiness for them to do their work: *Addison* on Contracts, 6th ed., 948, 949, 950; *Jones v. Barkley*, 2 Dougl. 694; *Thornborow v. Whiteacre*, 2 Ld. Raym. 1164.

McMichael, Q. C., contra. The defendant when sued on a contract may traverse the plaintiffs' readiness and wil-

lingness. He need not allege his own. The plaintiffs are not now suing on the contract, therefore they need not aver, they were ready and willing, and their replication is a full answer to the plea : *Bullen & Leake*, Prec. 3rd ed. 677 ; *Russell v. Viscount Sa. da Bandeira*, 13 C. B. N. S. 168, 205 ; *Holme v. Guppy*, 3 M. & W. 387.

[The Court referred to *Taylor v. Caldwell*, 3 B. & S. 826.]

WILSON, J., delivered the judgment of the Court.

The case of *Thornborow v. Whiteacre*, 2 Lord Raym. 1164, referred to in the argument, shews that an agreement to deliver two grains of rye corn on Monday, the 29th of March, and double the number on every succeeding Monday for a year, was not a void contract, although the quantity of corn to be delivered altogether was very enormous. It was not impossible of performance : "it was only impossible with respect to the defendant's ability, which was not such an impossibility as would make the contract void." And the case of *Jones v. Barkley*, 2 Doug. 694, was referred to for the purpose of shewing that the plaintiff in his replication should have alleged he was ready and willing to do the work he had contracted to do.

It was, therefore, contended that, although the building, in and upon which the work had to be done, was not sufficiently advanced to permit the work to be done by the 1st day of July, and although it was impossible for the plaintiff, in consequence thereof, to complete the work by that day, and although all that arose from the act of the defendant, his agents, workmen, and contractors, over whom the plaintiffs had no control—the plaintiffs were, nevertheless, bound to do their work by the day named, or to have been ready and willing to do it ; and that for every week after that day they had not their work finished, they are liable to the deduction of \$50.

The plaintiffs dispute that mode of construing the contract. And the cases referred to on their behalf, shew that if by reason of such conduct which is attributed to the defendant here, the plaintiffs have not been able to do the

work by the time agreed upon, the defendant cannot make them pay for his default.

This seems to be reasonable. The defendant, who has different kinds of work to do upon his building—such as masons' and bricklayers' work,² carpenters' work, and iron work—must be able to give to the different workmen or contractors possession of or the means of doing the work they have to perform, before he can charge them with neglect or delay. It is a condition always implied without any express provision on the subject.

The cases of *Taylor v. Caldwell et al.*, 3 B. & S. 826 ; and *Roberts v. Bury Improvement Commissioners*, L. R. 5 C. P. 310, in Ex. Ch. are also applicable.

If the plaintiffs had brought an action on the contract against the defendant for not permitting them to do their work,³ or for delaying the time for beginning it, they would have been obliged to have averred that they were ready and willing to do it, for they could not claim damages on a contract which they were never ready to perform. But the plaintiffs are not suing on the contract, and it is enough for them to show that the defence which the plea sets up should not prevail.

The defendant says, true it is the plaintiffs are suing for their work and labor, but he has a deduction to make from their demand. The plaintiffs say he has no right to make such a deduction, because the circumstances in respect of which the right to deduct is claimed shew the defendant was alone to blame, and he cannot make them pay for his neglect. The defendant now says, all that may be true, but the plaintiffs themselves, were not ready to begin their work by the day fixed.

I cannot see how the want of that readiness can give the right to deduct for the defendant's own acknowledged default. But I can see how it would afford a good defence if the plaintiffs were proceeding upon the contract against the defendant for not allowing them to perform their work.

The plaintiffs are entitled to judgment on the demurrer.

Judgment for plaintiffs.

RE WESCOTT ET AL. AND THE CORPORATION OF THE COUNTY
OF PETERBOROUGH.

Mandamus to build bridge—*Public Works Act, Consol. Stat. C. ch. 28, sec. 10, schedule "A"*—*Authority of County to build.*

In 1856 a road company obtained leave to build a bridge at a point on the O. river, from the Public Works Department, under whose control this portion of the river was, upon condition that in the event of navigation being resumed the bridge should be removed, and if the Government required a drawbridge should be substituted. Navigation being resumed, the bridge was ordered to be removed by the Department, and was removed by the County, under whose control the road had passed. Upon application for a mandamus to the Corporation of the County to build a swing or other bridge at the point: *Held*, that it was discretionary in the Government to allow a bridge there or not, and that the County were neither authorized nor compelled to build it. The application was therefore refused.

In Michaelmas Term last, *J. K. Kerr* obtained a rule *nisi* for a mandamus to be directed to the County of Peterborough, commanding the County to repair, reconstruct, and reopen the bridge over the river Otonabee, being a County bridge over which the County had exclusive jurisdiction, and which bridge might be known as the bridge over the Otonabee at the locks below the town of Peterborough, at Whitlas's rapids; or for a mandamus to compel the County to erect a swing or other bridge at the point in question, being a Township boundary, and being a leading highway and under the exclusive jurisdiction of the County; or for such other rule or order as might seem necessary to enforce the duty of the County to erect and maintain a proper bridge, &c.; upon the ground that it was the duty of the County to erect and maintain a proper bridge at the point indicated, and upon grounds disclosed in affidavits and papers filed.

A number of affidavits were filed on behalf of the applicants and the County, and the facts in them material to the report are as follows:—

It appeared from the papers filed by the applicants, that the bridge that had been erected across the river at the lock in question was built under the authority or order of the Governor General in Council, dated 6th December,

1856, under which order of council the Peterborough and Otonabee Road Company had permission to construct the bridge, and to rest part of it upon one of the piers built in the river by the Department of Public Works, upon condition that the Road Company should maintain the pier in question, and that while permitting the bridge to be built without a draw arch, it was upon the distinct condition and engagement by the Company, that should the navigation of the river by steamers or other craft requiring a draw arch be resumed, the portion of the bridge obstructing them should be at once removed, on a demand to that effect being made by that Department, and a draw arch substituted.

It also appeared that the bridge was removed in consequence of navigation being resumed, and a draw arch required.

During this Term *R. A. Harrison*, Q. C., with him *Scott*, of Peterborough, shewed cause. The applicants fail to disclose any facts shewing a duty on the county. The affidavits do not show how the road became vested in the county, or that it is a county road. There is no duty at Common Law, and there is none under the Municipal Act of 1866, sec. 315. It appears that the *locus in quo* is not within the jurisdiction of the County, and that in fact they have no power to erect a bridge at the point; the power to do so rests in the Crown Lands Department. The County is called upon to erect what might be a nuisance in law. At most, the erection of a bridge is a matter of discretion with the County, but if a duty, then the remedy should be by indictment; *Regina v. The Trustees of the Oxford and Witney Turnpike Roads*, 12 Ad. & E., 427; *Regina v. The Municipal Corporation of the County of Haldimand*, 20 U. C. R. 574; *The St. Catharines, Thorold and Suspension Bridge Road Co. v. Gardner*, 21 C. P. 190.

J. K. Kerr, contra. It is the duty of a County to build bridges over streams between Townships. But at all events

here the County are estopped from saying it is not their duty, for they have for years maintained the road, and they cannot now disclaim their liability: See *Kinnear v. The Corporation of the County of Haldimand*, 30 U. C. R. 398; *Regina v. The Corporation of the Village of Yorkville*, 22 C. P. 431. As to this application being the proper remedy, and not indictment: *In re The Municipality of the Township of Augusta and the Municipal Council of the United Counties of Leeds and Grenville*, 12 U. C. R., 522; *Regina v. Brown et al.* 13 C. P., 356. As to the power and duty of the County, see *Moore v. The Corporation of the Township of Esquesing*, 21 C. P. 277; Municipal Act of 1866, section 341.

Consol. Stat. Can. chap. 28, sec. 10, and also schedule "A" shew that the locks and piers only are vested in the Public Works Department. The order in council gave power to build a bridge. He also referred to *The Corporation of Wellington v. Wilson et al.*, 14, C. P. 299, S. C. 16 C. P. 124; *Colbeck et ux v. The Corporation of the Township of Brantford*, 21 U. C. R. 276; *Irwin v. The Corporation of Bradford*, 22 C. P. 18.

Harrison, Q. C., in reply cited *Regina v. Frost*, 8 A. & E. 823; *Jarvis v. The Great Western Railway Co.*, 8 C. P. 115; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316.

[Several other points were taken and cases cited in support of them, upon the assumption that the County had jurisdiction, or was in duty bound to erect the bridge, but it is thought unnecessary to insert that portion of the argument.]

MORRISON, J., delivered the judgment of the Court.

We are all of opinion that we cannot grant this application.

To entitle the applicants to have the mandamus they seek, they must shew that the corporation has not only authority to build a bridge across or near this dam or lock, but that it is a duty cast upon them so to do; and we think they have failed in shewing either.

Under the Public Works Act, Consol. Stat. C., ch. 28, sec. 10, the several public works, &c., enumerated in the schedule "A" to that Act, and all materials and other things belonging thereto, &c., shall be and continue to be vested in Her Majesty, and under the management of the Commissioner of Public Works for the purposes of the Act.

And in schedule A. we find among the public works referred to, "That portion of the Otonabee River between Peterborough and Rice Lake, with the lock and dam at Whitlas's Rapids." And in section 12, "All lands, streams, or water-courses, and other real property acquired for the use of such public works, shall be vested in Her Majesty for the purposes of the said works," &c.

It was admitted on the argument, and the papers filed shew, that the bridge, owing to the navigation of the river having been resumed, had to be removed.

The applicants now seek the aid of this Court to compel the corporation to reconstruct and reopen the bridge in question, or to make, erect, and maintain a swing bridge or other bridges across the river at the locks—that is, across this public work.

It was not shewn to us, that the corporation had any right or authority, without the consent and permission of the Board of Works, to interfere with this part of the river to erect any kind of a bridge. It was concluded that a swing bridge was required, and no authority was cited to shew, even if the government consented, that the corporation were bound to build a bridge of that character.

It appears to us that it is a matter entirely in the discretion of the government whether any bridge should be built across this public work, and if permitted it is for the Commissioner of Public Works to designate the particular kind of bridge and the conditions under which it should be erected and maintained; for instance, that the draw arch should be of a certain size, and that it should be under the control of a person appointed by the Commissioner of Public Works, and perhaps paid by the cor-

poration, for we cannot suppose the navigation would be subject to the discretion or authority of the corporation.

The general rule is, that before the Court will command the execution of the particular act or duty, the subject matter of the writ must be clear, and the act itself must be a duty imperative and not discretionary.

Looking at the circumstances of this case, as appearing in the affidavits filed on the part of the applicant, and the application asking us to compel the corporation in effect to interfere with this public work, which is under the management of the Commissioner of Public Works, we think we ought not to interfere; and this rule is discharged.

Rule discharged.

WYLD ET AL. V. THE LONDON AND LIVERPOOL AND GLOBE
INSURANCE COMPANY.

Fire Insurance—Description of premises in policy—Mistake—Reforming policy.

On the 9th of August, 1871, the plaintiffs applied to the defendants through their agent, H., at Hamilton, for an insurance on goods to the amount of \$6,000, contained in a store on the South side of King street, described in the application as No. 272, in defendants' special tariff book, and marked No. 1 on a diagram endorsed on the application, and received from H. a letter and receipt for the premium, \$37.50, being at the rate of 62½c. on the \$100. On the following day the plaintiffs notified H. that they had added to their premises two flats in the adjoining building (which would be No. 273 in defendants' special tariff book), and had placed part of their goods there. A few days after, H. inspected the building, and said an extra rate would be required. On the 29th H. notified defendants of the opening into the adjoining building, and asked as to the rate to be charged. The secretary at Montreal on receiving the letter pencilled on the application the fact of the opening, and he had previously drawn on the application a sketch of the premises taken from a former policy, when the plaintiffs only occupied 272. An increased premium, making in all one per cent, was fixed and paid by the 23rd September, and the policy issued immediately thereafter, dated as of the 9th of August, describing the premises substantially as in the application, and referring to the sketch and pencilled opening, through which it was said there was a communication with the adjoining house (No. 273.) The policy was handed to the plaintiffs in September, 1871, and the premises were burned in March, 1872.

Held, that the alteration in the premises having been made before the policy issued, the description therein did not extend to or cover the goods which were in the adjoining flats added when the extra premium

was paid and the policy issued, and that the plaintiffs suing upon the policy were bound by the description contained in it.

Semble, however, that the policy was not in accordance with the intention of the parties, the notice to and knowledge of H, as to the storing goods in 273, being notice and knowledge to the defendants; and that in equity the policy might be reformed.

ACTION upon a policy of insurance against fire on goods, dated the 9th of August, 1871.

The pleas, seven in number, raised substantially the question whether the goods destroyed were covered by the policy.

The cause was tried at Hamilton, at the Fall Assizes of 1872, before Stephen Richards, Q. C., sitting for Wilson, J.

The general facts of the case were, that on the 9th of August, 1871, the plaintiffs being the occupants of the house spoken of as No. 272 in the special tariff book of the defendants, or as No. 1, in the diagram in pencil on the back of the application of that date, in which they carried on an extensive dry goods business, made application through Mr. Hooper, the agent at Hamilton of the defendants, for insurance against loss by fire in the sum of \$6,000, and received an interim receipt for \$37.50, being the premium at 62½ cents per \$100 on the amount insured.

The application was as follows :—

HAMILTON AGENCY,

Policy No. 1,379,395.

Head Office Application No. 10,995.

Application No. 691.

The Liverpool and London and Globe Insurance Company.

General Instructions for Guidance of Applicants.

Application of Messrs. Wyld & Darling, of Hamilton, for insurance against loss or damage by fire by the Liverpool, &c., Company, on the usual terms and conditions of the Company's policy, in the sum of \$6,000 for the term of one year, commencing the 9th day of August, 1871, at noon, on the property specified, to wit : on the stock of dry goods, consisting chiefly of cloths and tailor's trimmings, con-

The defendants' secretary, Mr. Smith, at the head office at Montreal, having the July application, on which no policy issued, in his possession at the time the August application was sent to him, sketched in pencil on the back of the August application a copy of the diagram which was on the back of the July application.

The building was described alike in both applications, as a stone building covered with S. in M. [shingles in mortar,] marked No. 1 in the diagram, on the south side of King street, Hamilton—"S. T." No. 272. The "S. T.," represented Special Tariff, and was sometimes described as "S. R.," or Special Rate.

The No. 272, was the particular number which this house bore in the special rate or special tariff book which was used by the defendants, and which had been prepared some years before by the defendants' inspector, F. A. Ball, Esq., of Hamilton.

A receipt for the \$60, the premium at \$1 in the \$100, was given by Mr. Hooper to the plaintiffs, on the \$6,000, in the same form and terms as the receipt before mentioned for the \$37.50 premium, which latter receipt was given, and superseded the former one, about the 23rd of September afterwards, when the additional rate was paid.

The earlier receipt described the house as a stone building on the south side of King street, Hamilton, "as described in the agency order of this date," which referred to the application.

Mr. Hooper also gave the plaintiffs, on the 9th of August, a letter stating the receipt of \$37.50c., and describing the building as in S. T., No. 272.

On the 10th of August, the plaintiffs notified Mr. Hooper in writing that they had "added two flats over Mr. Williams's store, next door to our former premises; and part of our stock is now in these new flats."

In a few days after that, Mr. Hooper called at the building and went over it with Mr. Darling. He saw the two openings, one in each flat, cut into the east building, and part of the plaintiffs' goods in that east addition. He said

the risk was very much increased thereby, and that he could not fix the additional rate, without consulting the head office; and the matter was left in abeyance.

The rate was not finally fixed till he got the additional \$22.50c., about the 23rd of September. The extra sum made up one per cent. on the whole sum insured.

Mr. Hooper did not inform the defendants of the notice of the 10th of August, nor of his inspection of the premises, until the 29th of August, although he had sent them the plaintiffs' application of the 9th of August.

On the 29th of August, he informed the defendants that the plaintiffs had cut an opening into the building adjoining on the east side, &c.; and asked the secretary at Montreal if he would accept the risk at one per cent.

Upon the receipt of that letter the secretary pencilled on the application, "There is an opening in the east end of the above, through which communication is had with the adjoining house, &c."

Immediately after the 23rd September the policy issued, and was handed to the plaintiffs. It described the building substantially as in the application, and referred to the opening as it was pencilled on the application. It was as follows:—The policy was dated 9th August, 1871, to Wyld & Darling—\$60 premium—sum insured, \$6,000—"On their stock of dry goods, consisting chiefly of cloths and tailor's trimmings, contained in a building owned by one Irvine, and occupied by the insured as a dry goods store, situated on the south side of King Street, Hamilton, Ont.: built of stone. Covered; shingles laid in mortar; and marked No. 1 on a diagram of the premises endorsed on application of insured, filed in this office as No. 10,995, which is their warranty, and made part hereof. S. R. No. 272.—Six thousand dollars.

N. B.—There is an opening in the east end gable of above, through which communication is had with the adjoining house, which is occupied by one Onyons as a coal oil store. Not more than two barrels of refined coal oil permitted in said store, but ten barrels of the same are allowed to be kept in the yard."

At the trial the learned Queen's Counsel submitted the following questions to the jury :—1. Did the two additional flats at the time the policy was issued form part of the premises occupied by the plaintiffs as their dry goods store, and were they at that time used as part of, and did they then form part of the building mentioned in the policy ? And if so, 2. Did the local agent of the defendants know that at the time the policy was issued ? And 3. Did the head office know that at the time they issued the policy ?

And he directed the jury, if they answered the first question in the affirmative, to find a verdict for the plaintiffs. The defendants' counsel objected to the charge.

The jury answered all the questions in the affirmative ; and they found a verdict for the plaintiffs on the first count, and assessed the damages at \$1834.62, besides the amount paid into Court, and for the defendants on the second count.

In Michaelmas Term last, *Burton*, Q. C., obtained a rule calling on the plaintiffs to shew cause why the verdict for the plaintiffs should not be set aside and a new trial ordered, on the ground that the same was contrary to law and evidence ; and for the reception of improper evidence ; and for the misdirection of the learned Queen's Counsel who tried the cause, in directing the jury to find for the plaintiffs if they found as facts that the adjoining premises to those mentioned in the application for insurance were at the time of the issue of the policy occupied by the plaintiffs, and were so occupied with the knowledge of the head office of the defendants ; circumstances which, if established, were immaterial in ascertaining the intent of the defendants and the nature and extent of the contract entered into by them ; and for reception of evidence, improperly, to vary or explain the policy sued on according to the alleged intention of one of the parties to it, the words of that policy being free from any ambiguity in themselves, and no difficulty or doubt as to the proper application of those words to the property insured being raised by external circum-

stances. And on the ground that there was no evidence to go to the jury of the knowledge on the part of the head office of the matter so submitted for their consideration, the plaintiffs' own evidence shewing that the only notice was contained in a letter notifying the opening in the gable wall in the premises referred to in the policy, and that of the defendants, that they had no other notice; and because the verdict of the jury was perverse, in finding against the defendants upon these points without evidence.

In this term *E. Martin* shewed cause. The policy, though dated the 9th of August, must be read as taking effect from the 23rd of September, when the extra premium was paid, and after and upon which the policy was issued.

That increased premium was paid in consequence of Mr. Hooper having demanded it after he had been notified by the notice of the 10th of August of the plaintiffs having taken in the two stories of the adjoining house as part of their premises, and after he had, in pursuance of that notice, called and specially inspected the premises. He then declared that the effect of the opening was to make the whole of the former and of the added premises one risk, upon the whole of the goods contained in the two places; and it was upon such entire stock the rate of one per cent. was imposed. The policy, although not in very plain terms, does cover the risk on the goods in both buildings. The reference there to the opening is not contained in the plaintiffs' application of the 9th, but it is contained in their notice of the 10th of August. That notice must, therefore, be read and considered with the policy, just as if the notice had been attached to it. The addition to what is called 272 made that addition a part of 272, although it was a lateral addition, just the same as if another story had been put on the top of the former building: *Sillem et al. v. Thornton*, 3 E. & B. 868; *Proprietors of the English and Foreign Credit Company v. Arduin et al.*, L. R. 5 H. L. 64, 70, 75, 83.

Notice to the local agent was the same as notice to the defendants: *Phillips on Insurance*, vol. ii., 5th ed., p. 526, sec. 1876.

The additional premium was not claimed for the mere opening made in the wall, but for the goods placed in the building which was so opened into ; and Onyons, who had possession of the rest of 273, had by the severance of communication of the part he held from that which the plaintiffs had, a separate tenement and an independent risk : *Phillips* on Insurance, 5th ed., vol. i., p. 222, 251, 252 ; *Harris et al. v. Scaramanga et al.*, L. R. 7 C. P. 481, 497 ; *Brill v. The Grand Trunk Railway Company*, 20 C. P. 440 : 29-30 Vic. ch. 51, sec. 66, D.

The following references shew in what way mercantile contracts, including policies, are to be construed when not expressed with literal exactness : *Phillips* on Insurance, vol. i., 5th ed., p. 418, sec. 762, p. 465, sec. 866 ; *Miller et al. v. Thompson*, 16 C. P. 513 ; *Ionides et al. v. The Pacific Fire and Marine Insurance Company*, L. R. 7 Q. B. 517, S. C. L. R. 6 Q. B. 674 ; *Davis v. The Scottish Provincial Insurance Company*, 16 C. P. 176, 184, 185, 186 ; *Carr et al. v. Montefiore*, 5 B. & S. 408, 430 ; *Behn v. Burness*, 3 B. & S. 751 ; *Cutten v. Kerr*, 16 C. P. 227, 233, 235 ; *Ireland et al. v. Livingston*, L. R. 5 H. L. 395, 403, 416 ; *Alexander v. Vanderzee*, L. R. 7 C. P. 530.

Burton, Q. C., supported the rule. Hooper had merely a limited authority, and he and the plaintiffs too knew it, or must be presumed to have known it.

The receipt for the \$60, which was granted in fact on the 23rd of September, has reference to the preceeding application of the 9th of August. It does not apply to the whole of the plaintiffs' premises in the two buildings. It refers expressly to the agency order special risk No. 272.

If a fire had happened before the policy issued, the receipt given on the 23rd of September and the application would alone have regulated and defined the plaintiffs' rights and the defendants' liability. As to the question of agency see *Fowler et al. v. The Scottish Equitable Life Insurance Company*, 4 Jur. N. S. 1169 ; *Linford v. The Provincial Horse and Cattle Insurance Company (Limited)*, 10 Jur. N. S. 1066.

The defendants' agent may have neglected his duty in not communicating the plaintiffs' notice of the 10th of August, but the defendants are not therefore liable. The defendants never knew the plaintiffs had removed any of their goods into No. 273; and they never contracted or intended to contract for a liability in respect of the goods in that building.

It is impossible to establish a risk upon any other goods than those which were in No. 272; and it is impossible to hold that No. 273 was or was ever intended to have been a part of or covered by the description of No. 272.

The policy speaks of the building as "marked No. 1 on the diagram," which expressly applies to No. 272 alone, and as "S. T. No. 272;" and as having "an opening in the east end, through which communication is had with the adjoining building, which is occupied by Onyons," which adjoining building is No. 273.

He referred to the following cases: *Rickman et al. v. Carstairs*, 5 B. & Ad. 651, 663; *The Beacon Fire and Life Insurance Co. v. Gibb et al.*, 9 Jur. N. S. 185; *Weston v. Emes*, 1 Taunt. 115; *Pickering et al. v. Dowson et al.*, 4 Taunt. 779; *Powell v. Edmunds*, 12 East 6; *Wright v. Crookes*, 1 Scott N. R. 685; *Barton v. Dawes*, 10 C. B. 261; *Doe dem. Ashforth v. Bower*, 3 B. & Ad. 453, 459; *Wood v. Rowcliffe*, 6 Ex. 407; *Earl of Verulam v. Bathurst*, 13 Sim. 374, 380; *Hall v. Fisher*, 1 Coll. 47; *Quennell v. Turner*, 13 Beav. 240; *Wigram on Wills*, 4th ed., 163.

WILSON, J., delivered the judgment of the Court.

I think nothing can or should turn upon the diagram upon the August application sketched there by Mr. Smith, the defendants' secretary. It was upon and as of the 9th of August a correct copy and representation of the premises, as furnished by the plaintiffs themselves in their July application.

The question is, does the policy as it stands at the

present time cover the goods in the whole premises as they were occupied by the plaintiffs at the time they paid the increased premium and at the time of the loss?

If it do, there is an end of the case. If it do not, it is equally ended.

It may be material in determining the question, to consider how far notice to Mr. Hooper and his acts will be notice to the defendants and their acts.

It is quite plain, and admitted by the defendants, that long before the increased premium was paid and the policy issued, the defendants, at the head office in Montreal, knew the plaintiffs "had cut an opening into the building adjoining on the east," and what kind of opening it was, and the purpose for which it was made, "through which communication is had with the adjoining house;" and they knew also the nature of the business which was carried on by Mr. Onyons, the occupant of the other part of the adjoining house.

They say that the opening so cut increased the previous risk, and that they did not intend to enlarge or alter in any respect the area or premises where the goods were placed at first: that they still confined their risk to No. 1 on the diagram—or to special risk No. 272—but at a higher rate by means of the opening; and that they never engaged to insure the goods or any of them which were or might be put into the adjoining building; and the fact that they described the premises in this special and limited manner, is evidence of that fact.

They contend also, that whether Mr. Hooper saw the goods in the adjacent building or not, when he went through it, and whether his knowledge of that fact is or is not to be deemed to have been the knowledge of the defendants, is of no consequence; because they never intended to insure any goods in the adjacent building, and they did not do it either in fact or in law; and that the adjacent premises were entered by them in their tariff books as special rate 273, altogether distinct from the building they insured as No. 272.

It is very obvious that the plaintiffs cut through into the adjoining building and added the two flats to their previous holding for the purpose of their trade and business, and that the defendants knew it, or may be reasonably presumed to have known it.

And it may also fairly be presumed, whatever the legal result of the plaintiffs' conduct may be, that they did not intend to leave the goods in the added premises uninsured; that they considered their property in the two buildings as one entire stock of goods, and their place of business as one establishment.

They had severed what is called No. 273, by dividing off their own portion of it completely from the residue of it. They had thus made Mr. Onyons's isolated part a distinct house, shop, and premises; and they had constituted their added portion of it as a parcel of their original premises for the purposes of tenure.

Could it be then properly described as part of special risk No. 272, or as No. 1 on this diagram?

A house or land may gain a name or description by reputation, different from the actual name of it.

In *Anstee v. Nelms*, 1 H. & N. 225, land was devised in the parish of Doynton. A part of it was in another parish, but it was held to have passed, because it was reputed to be in Doynton.

In *Doe dem. Dunlop v. Servos*, 5 U. C. R. 284, one who had a patent for lot five, and who held part of four as a part of five, was held to be right in defending such part of four by the description of it as a part of five.

And in *Dodd v. Birchall*, 8 Jur. N. S. 1180, it was said, "To understand the meaning of an instrument you should put yourself in the position of the grantor and grantee, and read it with all the knowledge they had at the time upon the subject. Having assumed this position, the writing is to decide the rights of the parties." See also *Carr et al. v. Montefiore*, 5 B. & S. 408; *Rickman et al. v. Carstairs*, 5 B. & Ad. 651.

But when the description given will fit some part of it

in every particular; and not another part of it, the description will be held to be applicable to that portion of it to which every part of the description can be read to extend, and not to go beyond that.

In *Webber v. Stanley*, 16 C. B. N. S. 698, the devise was of "my mansion house at Tedworth, in the County of Hants, and all my manors, farms, lands, * *. in the County of Hants." The mansion house and a portion of the lands, of the yearly value of about £2,000 were in Hants, and the residue of the land, of the yearly value of £2,500, was in the county of Wilts. There was no boundary, either natural or artificial, to separate the two counties, and some of the farms were partly in Hants and partly in Wilts, the county boundary in some instances dividing fields, and even separating cottages from their gardens. It was held, that as there was a property which every part of the description applied to, and on which every word had full effect, the devise must be limited to so much of the land as was actually in the county of Hants, there being no intention expressed of giving property situated out of Hants. It was said, "the Tedworth estate," if so described generally, would have carried the whole property; and on p. 759 "that, in construing a will, alteration of the words cannot be allowed for the purpose of effecting an intention collected only from the extrinsic facts and opposed to the words as they stand."

So, a devise of "messuages, manufactory, &c., on the west of High street, in the occupation of R. and A. and others, together with all rights and appurtenances to them belonging," was held not to pass one of the manufactories on the east of High street, although for thirty years before and at the time of the testator's death the two manufactories, one on each side of High street, had been and were jointly occupied by his tenants at a single rent; because they were capable of being used separately: *Smith et al. v. Ridgway*, L. R. 1 Ex. 46, affirmed in Ex. Ch. L. R. 1 Ex. 331.

It was said in the last mentioned case, p. 333, "No doubt

words *primâ facie* describing only a building may be construed to include land so intimately connected with the use of the building that without it the building would be useless, as in the cases collected in *Steele v. The Midland Railway Co.* L. R. 1 Ch. App. 275, and in the notes to *Smith et al. v. Martin*, 2 Wms. Saund. 802. It may be further admitted that 'manufactory' is a larger and vaguer term than 'house,' and that it may include not only the place where the machinery works, but outbuildings, as drying houses, or even land used in the course of the manufacture, as for instance bleaching grounds. But here the difficulty is, that what is sought to be included is not a mere accessory to the factory with which it is said to pass, but is at some distance from it, and is capable of being itself used as a manufactory."

In *Steele v. Midland R. W. Co.*, L. R. 1 Ch. App. 275, the plaintiff was owner and occupier of a house and six acres of meadow land on the west of the Edgeware road. He had a large family, and the ground he had being insufficient for the horses and cows which he kept for their use, he bought six and a quarter acres on the other side of the road, the nearest point being 120 yards from his entrance gate. At the nearest point were a cow house, loose box, and a cottage which was occupied by his groom, because he had no accommodation for them on his own side of the road, and he for a number of years occupied the land for the purpose of feeding the horses and cows requisite for his establishment. Held, that the six and a quarter acres could not be considered part of the house, within the meaning of the Railway Act.

Lord Justice *Turner* said: "I take the law on that point to be that by the description of a 'house' what is necessary for the convenient occupation of the house will pass. But what is contended here is, that not only what is necessary for the convenient occupation of the house passes, but that what is subsidiary to or necessary for the convenience of the occupant of the house will also pass.

* * *

That argument is altogether founded,

in my judgment, upon a fallacy. The horses and cows are not necessary for the use and enjoyment of the house. They are necessary, if necessary at all, for the personal use and enjoyment of the person by whom the house is occupied."

The two flats would be a separate *house* from the lower part occupied by Onyons. And they would be considered not as a separate house from (what may be described at the present as) No. 272, but as a part of it, because they had no distinct entrance or exit to or from them, and could be reached or departed from only through 272: *Cook v. Humber*, 11 C. B. N. S. 33; *Henrette v. Booth*, 15 C. B. N. S. 500; *Thompson v. Ward*, L. R. 6. C. P. 327.

If the plaintiffs had, at the time of insurance, a long lease for years by separate demises of these two respective properties, an assignment of their *premises* or their *shop* or *establishment* on King street, would, if they had used them both in one, or as one place of business, have passed them by such a description.

So, if the two properties had acquired by reputation the designation of No. 272, or if the plaintiffs had a sign with their names over their place of business, and 272 painted as part of their description, an assignment of *the premises*, by the designation of 272, would have passed them both.

So, if the plaintiffs had proposed by letter to assign to another *their place of business*, known as 272, they would have passed.

But a lease or assignment of their interest *in building* No. 272 might not pass their interest in building 273, unless there happened to be something in the writing which shewed that such a description was used and was intended to cover both properties. As, for instance, "all their premises on which they carry on their dry goods business, in, or called, or known, as No. 272," &c.

Here the policy refers to the goods "in a building, owned by Irvine and occupied by the insured as a dry goods store, situate on the south side of King street, in Hamilton, built of stone, &c." So far, every word is just

as applicable to their extended as to their original premises; but the description proceeds, "and marked No. 1 on a diagram of the premises, endorsed on application of insured and fyled in this office as No. 10,995, which is their warranty, and made part hereof, S. R. No. 272."

Now the latter words do restrain the generality of the first part of the description. The insurance is not only on a stone building occupied by the insured, but one which is also "marked as number one on a diagram," and which by the defendants' special rate-book is known as No. 272."

And the opening from it into the two flats is said to be made for the purpose of having communication "with the adjoining house."

I am of opinion the policy does not in fact extend to more than to the building marked number one on the diagram, and that it does not extend to the two flats in the adjoining house.

If the adjoining two flats had been added on or taken in by the plaintiffs as part of their premises after the issuing of the present policy, the policy would, in my opinion, have extended to the goods which were in it as well as to those in the original premises.

If the plaintiffs had added a story to their building after this policy, the goods in the new story would have been protected, because there is no implied warranty that the premises shall not be altered or enlarged after the making of the policy. And the enlargement may as well be lateral as vertical. And there can be no distinction between the lateral addition being by a new building, or by the addition of a part of a building already erected.

But here the addition was made between the time of the application and the issuing of the policy.

The application which has been acted on by the defendants is the one of the 9th of August, modified by Mr. Hooper's letter of the 29th of August, and as expressed by the pencil memorandum relating to the openings, and this application they refer to in their policy "as their warranty."

The plaintiffs have accepted the policy so issued, and are now suing upon it.

That the plaintiffs did, in fact, alter or amend their application, as they believed, by their notice of the 10th of August, is quite certain, and so Mr. Hooper undoubtedly understood it. If the defendants are bound by the notice so given to him, and by all he did, they may be obliged to submit to have their policy reformed, as the plaintiffs and the defendants' authorized agent contracted and intended to contract.

But on this policy we are obliged to construe it against the plaintiffs.

The case of *Ionides et al. v. The Pacific Fire and Marine Insurance Co.*, L. R. 7 Q. B. 517, does not help the plaintiffs. We refer to *Sillem v. Thornton*, 3 E. & B. 868, as corrected in *Thompson et al. v. Hopper*, E. B. & E. 1038 1049, which, we think, in addition to the cases before mentioned, shews that the question of "parcel or no parcel of the property" in which the goods were, which were described to be insured, bears against the plaintiffs.

It was a material statement where and in what premises the goods were at the time of the policy. I mean the statement as acted upon rightly or wrongly by the defendants, and assented to for the purposes of this suit by the plaintiffs: *Behn v. Burness*, 3 B. & S. 751; and on this policy the identity of the premises is not in accordance with the plaintiffs' contention. And the application of the 9th of August must be received as the one on which the policy was issued: *Martin v. The Home Insurance Co.*, 20 C. P. 447.

In *Weston v. Ewes*, 1 Taunt. 115, parol evidence of what passed at the time of effecting a policy was not allowed to be given, as it would be making it a part of the written contract.

Fowler v. The Scottish Equitable Life Insurance Co., 4 Jur. N. S. 1169, is to the same effect; and there the Vice-Chancellor refused to reform the policy, because the agent had no power to bind the company by stipulating that

the policy should not be vitiated by the insured visiting ports on the coast of Africa. In that case, the insured drew up the proposal not embodying that provision, and the policy issued in accordance with the proposal.

It was said by the V. C. that the agent and the insured both knew the agreement was to have legal effect by an instrument, not which the agent in London was to issue, but which was to be issued by the company in Edinburgh. And he thought that as the insured had himself drawn up the proposal, by his own mistake omitting the condition he had verbally stipulated for, and as the company never knew of the real bargain, and as they assented to that which they knew as contained in the proposal, there was no agreement at all.

The defendants' counsel referred also to a number of cases as to the construction of different instruments.

Hall v. Fisher, 1 Collier 47, was a devise of a freehold farm called the Wick farm, containing 200 acres, occupied by W. E. Held, it did not pass twelve acres *of it* which were leasehold, and although occupied by W. E.

Wood v. Rowcliffe, 6 Ex. 407, was a bill of sale of goods and furniture of every kind in a particular house, "more particularly mentioned in an inventory of even date herewith." Held, the goods in the whole house did not pass, but those only which were contained in the schedule.

Barton v. Daves, 10 C. B. 261, was a conveyance of all that messuage, &c., and several closes, &c., of land thereto belonging, called Gotton farm, in the occupation of J. S., "and consisting of the several particulars specified in the first division of a schedule thereunder written, and more particularly delineated in a map or plan thereof drawn in the margin of the said schedule." Held, that a slip of land not in the plan or schedule, had not passed, and that the deed was conclusive. See also *Doe dem. Ashforth v. Bower*, 3 B. & Ad. 453.

In *Rickman v. Carstairs*, 5 B. & Ad. 657, the Court held that an outward bound cargo was not insured, although they thought the party intended to do so. Lord Denman,

C. J., said, at p. 663, "The question in this and other cases of construction of written instruments is not what was the intention of the parties, but what is the meaning of the words they have used."

Carr v. Montefiore, 5 B. & S. 408, was a case of the same kind, but the Court held there from some special facts that the loading could properly be said to have begun at the port contended for by the insured.

The policy in question does not extend to the premises referred to as No. 273.

The application has not been formally amended. The plaintiffs knew the policy or actual contract was to be made and perfected at Montreal. The policy was issued and has been taken by the plaintiffs.

That the plaintiffs did correct their application by their notice of the 10th of August, seems to be quite clear; that Mr. Hooper, the agent, so understood it, is also, I think, clear; that he did not communicate it, but only such information as his letter of the 29th of August contained, to the defendants, is also a settled fact; that the head office must have known the plaintiffs would use the two added stores as part of their general premises for their goods, I should think to be without much if not free from all doubt; that they believed there was a difference in the risk to the goods in the two stories from what there was to those in the other building, may be open to doubt; but the result shewed that there was such a difference in fact.

That additional risk Mr. Hooper, from the evidence, did in fact take, and did intend to take and, if he had authority to take it, the plaintiffs may not be without a remedy against the present unfair and impolitic defence.

In my opinion, Mr. Hooper, who had full authority to take all applications for insurance, and to grant the usual interim receipts, was the proper person to notify of any change, modification, or correction required to be made by the applicant in his proposal; and it was his duty to have informed his principals of it. The plaintiffs, when

they paid the additional rate on the 23rd of September, had every reason to believe that they were paying on their amended application. That notice is, in fact, a part of the application, and the policy has not issued in accordance with the true terms and requirements of the application.

The notice and knowledge in this case, were the notice and knowledge of the defendants, for he was acting strictly within the line and scope of his duty on the occasion when he received the amendment to the application, and inspected the premises in pursuance of it.

The following cases bear on the point of agency : *Fowler et al. v. The Scottish Equitable Life Insurance Co.*, 4 Jur. N.S. 1169; *Linford v. The Provincial Horse and Cattle Insurance Co.*, 10 Jur. N. S. 1066; *Wing v. Harvey*, 18 Jur. 394; *Hendrickson v. The Queen Insurance Co.*, 30 U. C. R. 108, S.C. in Appeal, 31 U. C. R. 547; *Beebee v. Hartford Mutual Insurance Co.*, 25 Conn. 51, (1856); *Wilson v. Conway Insurance Co.*, 4 R. I. 141, (1856); *Beal v. Park Insurance Co.*, 16 Wis. 241, (1862); *Woodbury Savings Bank v. Charter Oak Insurance Co.*, 31 Conn. 517, (1863); *Peoples' Insurance Co. v. Spencer et al.*, 53 Penn. St. 353, (1866).

I have noted the American cases from the Digest of Insurance Decisions, 2nd edition, 1868, revised and enlarged by Stephen G. Clark, where many other cases of the like kind are referred to, under the heading of "Agent."

The rule must be made absolute, because the policy as issued does not extend to and cover the goods which were at the time when the extra premium was paid, and when the policy issued, in the two stories, part of the building referred to as No. 273.

Rule absolute.

THE QUEEN V. CASWELL.

32-33 Vic. ch. 21, sec. 25—Conviction under—33 Vic. ch. 27, secs. 1, 2—
Appeal to wrong Sessions—Certiorari.

A conviction having been made within twelve days of the next Sessions, notice of appeal was given to such Sessions, instead of to the second Sessions after the conviction, contrary to the 33 Vic. ch. 27, sec. 1, and the appeal was not heard. *Held*, that such notice being inoperative, there had, in effect, been no appeal, and the right of *certiorari* was therefore not taken away by section 2.

Held, also, that under the circumstances notice to the Chairman of the Sessions of defendant's intention to move for the *certiorari* was not required.

The conviction stated, that "Joseph Caswell had on his premises a quantity of chopped wood, to wit, about half a cord, belonging to Thomas Fulton, which said Thomas states was taken and stolen from him, and which said Joseph could not satisfactorily account for its possession:"

Held, that the conviction was bad, because 32-33 Vic. ch. 21, sec. 25, under which it was made, applies to trees attached to the freehold, not to trees made into cordwood, and because cordwood is not "the whole or any part of a tree," within the statute.

Semble, that the conviction was also bad for not alleging that the property taken was of the value of twenty-five cents at the least; the direction in the conviction, that the defendant should pay seventy-five cents for for said wood, not being a finding that it was of that value.

Semble, that the conviction sufficiently stated that defendant was in possession of the wood.

MOTION to quash a conviction, and counter motion to quash the *certiorari* removing the conviction, and all proceedings had under the *certiorari*.

The charge in the information was, that the defendant "did steal and take away a quantity of chopped wood, viz., about half a cord of elm wood."

The evidence was, that the prosecutor missed his wood, and followed a track to where the wood was, and he found his wood gone.

The prosecutor said, "I then traced the track to Joseph Caswell's house, and I found my wood on his premises. I never gave him any permission to take the wood. I lost six cords of the value of one dollar and a-half a cord. I saw half a cord at Caswell's. I did not see him take the wood."

The magistrate then noted, "Here the defendant admitted, that the wood that was seen on his place by Thomas

Fulton was the wood which is mentioned in the above deposition, viz., the half-cord last referred to."

The conviction, dated 1st December, 1871, stated that "Joseph Caswell is convicted before the undersigned, one of Her Majesty's Justices of the Peace for the said County of Middlesex, for that the said Joseph Caswell had on his premises a quantity of chopped wood, to wit, about half a cord, belonging to Thomas Fulton, which said Thomas states was taken and stolen from him, and which said Joseph Caswell could not satisfactorily account for its possession; and I adjudge the said Joseph Caswell, for his said offence, to forfeit and pay the sum of five dollars for a penalty, and seventy-five cents for the wood, to be paid and applied according to law," &c.

It appeared that the appeal was not heard at the December Sittings of the Court of General Sessions, but an order was made against the appellant for costs.

In Easter Term last *Ferguson* obtained a rule, upon reading the *certiorari* and other papers, calling upon Patrick McIlhargey, the convicting Justice, and upon Thomas Fulton the complainant, on the first day of the then next Michaelmas Term, to shew cause why the conviction should not be quashed, on the grounds:

1. That there was not any evidence, or sufficient evidence, to sustain the same.
2. That Caswell was not and is not guilty of the offence charged, or of any offence.
3. That the convicting magistrate had not any jurisdiction to make the conviction, or in the premises.
4. That the conviction does not clearly or properly state or set forth any offence or crime whatever, and is clearly bad in law.
5. That Caswell was at the time of making the conviction improperly precluded from adducing evidence to shew his innocence of the crime or offence charged, or pretended to be charged against him.
6. And on grounds disclosed in affidavits and papers filed.

In Michaelmas Term last *Harrison*, Q. C., obtained a rule calling on Caswell to shew cause why the writ of *certiorari* issued to remove a conviction in the matter of appeal to the Court of General Sessions of the Peace in and for the County of Middlesex, wherein Caswell was appellant and Thomas Fulton was respondent, and all proceedings had thereunder, should not be quashed, with costs, and a writ of *procedendo* be issued out of this Court in the matter of the said conviction, upon the grounds,—

1. That the *certiorari* was issued improvidently, the same having been issued upon proof of notice of the application to the convicting Justice only, and it not having been shewn that notice had been given to the Chairman of the Court of General Sessions and his associates.

2. That the conviction was affirmed on appeal, and so ought not to have been removed by *certiorari* into any of the Superior Courts of record.

3. That the writ was for the removal of the information, depositions, evidence, and all things touching the same, and not for the removal of the order of the General Sessions affirming the conviction, and all things touching the same.

The proceedings in this matter, in this Court, were begun by an application in Chambers, made on certain affidavits and papers filed, which were re-filed on these motions in this Court, and upon which, on the 25th March, 1872, the Clerk of the Crown and Pleas granted a summons, calling on Patrick McIlhargey, Justice of the Peace of the County of Middlesex, and Thomas Fulton, the prosecutor, to shew cause why a writ of *certiorari* should not be issued to remove the record of conviction before mentioned.

The summons was enlarged to be heard before a Judge. And on the 20th April, 1872, Mr. Justice Galt ordered a writ of *certiorari* to be issued.

It was directed to the Chairman of the General Sessions of the Peace, and to the convicting Magistrate.

And the Chairman returned the information, the summons, the depositions, and the conviction, together with the recognizance and affidavits of justification.

The *certiorari* and papers returned with it were filed on the 23rd of May, 1872.

On the 4th December, 1872, the convicting Magistrate filed an affidavit, that the conviction was made on the evidence of the prosecutor, and on the admission of the defendant that he had taken the wood; that he did not refuse to receive evidence from the defendant, nor did the defendant offer any evidence, or ask for an adjournment to enable him to do so; and that the deponent believed he had authority under the 32-33 Vic. ch. 21, sec. 25, D. to make the conviction.

During Michaelmas Term *Harrison*, Q. C., shewed cause to the defendant's rule, and supported his own.

The conviction is in the words prescribed by 32-33 Vic., ch. 21, sec. 25.

The conviction was by the notice of appeal served by the defendant transferred to and before the Court of General Sessions of the Peace, although not formally so: *Rex v. The Justices of the West Riding of Yorkshire*, 3 T. R. 776; *Regina v. The Justices of Middlesex*, 9 Dowl. 163. The Dominion Act, 33 Vic. ch. 27, sec. 2, prevents the *certiorari* in this case, because there has been an appeal to the Sessions, although it was an imperfect one. No notice has been given to the Chairman of the General Sessions of the Peace of the defendant's intention to apply for the writ of *certiorari*: *Regina v. The Inhabitants of Cartworth*, 5 Q. B. 201; *Regina v. The Inhabitants of Gilberdike*, *Ib.* 207; *Regina v. Ellis*, 25 U. C. R. 324. There is no motion to quash the proceedings had before the Court of General Sessions of the Peace: *Regina v. Johnson et al.*, 30 U. C. R. 423. The conviction should not be quashed on the merits. There is evidence sufficient to support it, and the defendant admitted the charge; the Magistrate had therefore to convict him. It will be contended for the defendant, that the alleged stealing, "a quantity of chopped wood, viz., about a half cord of elm wood, contrary to the statute," is not within the Act in question, 32-33 Vic. ch. 21, sec.

25, D., which provides that, "If the whole or any part of any tree, sapling, or shrub, or any underwood . . . being of the value of twenty-five cents, at the least, is found in the possession of any person with his knowledge, and such person . . . does not satisfy the Justice that he came lawfully by the same, he shall, on conviction," &c. But chopped wood, or cord-wood, is a tree, or part of a tree. The conviction states the offence in the very words of the statute, and by the Criminal Procedure Act, 32-33 Vic. ch. 29, sec. 79, D., that is all that is necessary to be done. It is not true that the defendant was precluded from giving evidence: he says so, but the Magistrate has answered it by a direct denial. If the fact were true, it would not be a ground for quashing the conviction.

Ferguson shewed cause to the prosecutor's rule, and supported his own. There has been no appeal to the Sessions; a notice to that effect was given, but it was not followed up, and the Sessions proceeded without authority or jurisdiction to decide upon it. But, even if the Sessions could decide against the validity of that notice and award costs, that did not take away from the defendant the right of appeal, which they had at the Court of the General Sessions of the Peace next after the Court held in December, because by 33 Vic. ch. 27, sec. 1, D., amending 32-33 Vic. ch. 31, sec. 65, D., the defendant could not appeal to the December Court, for which his notice was given. The Orders in Sessions awarding costs against the defendant were made under 32-33 Vic. ch. 31, sec. 69, D. They were not rightly made, because the appeal could not be made, as before stated. But, notwithstanding these orders, there still has been no appeal, and the defendant is entitled to maintain his writ of *certiorari*.

Then as to the merits. There was no evidence to sustain the charge. And the charge was, if proved, a larceny, but not an offence of stealing a tree, or any part of a tree, under 32-33 Vic. ch. 21, sec. 25. The enactment is intended to protect the freehold, a standing or growing tree, and not a tree or any part of a tree which has been severed from

the freehold. That kind of property needed no special protection ; it was protected before.

WILSON, J., delivered the judgment of the Court.

The objection, that the appeal was begun by a notice given in December, 1871, which was dismissed by the Court of General Sessions of the Peace, and so the conviction cannot, by the 33 Vic. ch. 27, sec. 2, be removed by *certiorari*, has been answered by the reference to sec. 1 of the last mentioned statute, which enacts that if the conviction be more than twelve days before the sittings of the Court to which the appeal is given, such appeal shall be made to the then next sittings of the Court, but if the conviction be made within twelve days of the sittings of such Court, then to the second sittings next after such conviction.

This conviction was made *within twelve days* of the sittings of the Court, and the notice of appeal which was given to the sittings *then next ensuing*, was void or inoperative, and was no hindrance to a proper notice being afterwards given, (if given within four days after the conviction), for the second sittings thereafter.

The notice of appeal which was given was in effect dismissed by the Sessions of the Peace. It could not be proceeded upon. The defendant did not, we think, appeal ; nor did the Sessions "affirm, or affirm and amend in appeal" the conviction. And it was still open to the defendant, after the dismissal of his unauthorized proceeding, to apply for a *certiorari* as if he had never given a notice of appeal at all.

It was next objected that the writ should be quashed, because no notice of the intention of defendant to move for the writ was given to the Chairman of the Court of General Sessions of the Peace.

The Chairman was one of the persons to whom the writ was directed, and he it was who returned the writ to this Court.

How it was he got the conviction and proceedings we

do not know, but we may conjecture. It is probable they were sent to the Sessions when the invalid notice of appeal was served, but the Court could not, and did not, on that notice, receive the appeal. The proceedings shew the appeal was not in fact entered at the Sessions.

The Sessions having neither affirmed nor acted on the conviction, it was properly still in the custody of the convicting Magistrate, to whom the writ of *certiorari* was also directed, unless he had returned it to the Sessions under the 32-33 Vic. ch. 31, sec. 72, in which case it would be rightly under the power of the Chairman of the Court, who could return it; but that Court would not, nor would any of the Justices of it be the Court of Justices by and before whom the conviction was made, and it is only such persons who are entitled to notice by the statute.

We think the cases cited, and the 13 Geo. II. ch. 18, sec. 5, do not apply to these facts.

The rule moved on behalf of the prosecutor must be discharged.

Then, as to the defendant's rule. It was said there was no proper evidence to sustain the charge.

The charge of stealing was not supported, because 32-33 Vic. ch. 21, sec. 22, D., applies to stealing, &c., the whole or any part of a tree *growing*: and this was not growing, but was cord-wood.

The conviction stated, that "Joseph Caswell had on his premises a quantity of chopped wood, to wit, about half a cord, belonging to Thomas Fulton, which said Thomas states was taken and stolen from him, and which the said Joseph could not satisfactorily account for its possession."

This does not find that Caswell stole the wood.

32-33 Vic. ch. 21, sec. 25, says, "If the whole or any part of any tree, * * being of the value of twenty-five cents at the least, is found in the possession of any person or on the premises of any person with his knowledge, and such person taken or summoned before a Justice of the Peace, does not satisfy the Justice that he came lawfully by the same, he shall, on conviction by the Justice, forfeit

and pay, over and above the value of the article or articles so found, any sum not exceeding ten dollars."

If the conviction mean, that the wood was found on the premises of the defendant, then it does not expressly allege that the wood was there *with his knowledge*.

And if it mean, that the wood was found *in the possession of the defendant*, then it may be contended it does not positively find that fact.

Does it by reasonable implication find that fact?

It finds, that Joseph Caswell *had on his premises* the wood which was taken and stolen from the prosecutor, and which the defendant *could not satisfactorily account for its possession*.

We are disposed to think that statement to be a sufficient finding by the Magistrate that the defendant was in possession of the wood, without being able to satisfy the Magistrate that he came lawfully by the same.

The statement that the defendant *had* the wood on his premises, is a stronger allegation than that the wood *was found* on his premises.

It might have been found there, and the defendant might have had no knowledge of it; but it is not so plain the defendant could have *had* the wood on his premises without any knowledge of it; and if he had it there, and if that implies the knowledge of its being there, or if he had it there, and could not account *for its possession*, we think, in one way or the other, the offence is well found. We think the finding rather establishes that the defendant had the wood in his possession, and did not account for the manner he came by it.

If this *conviction had shewn* that the defendant had appeared and pleaded, &c., it would not be vacated for any defect of form whatever. The construction would then be such a fair and liberal construction as would be agreeable to the justice of the case: 32-33 Vic. ch. 31, sec. 73, D.

But although the conviction does not shew these matters, we think it may be sustained against this objection.

It was further contended that the conviction was defec-

tive, because it found that the defendant had so much cord-wood in his possession, or on his premises, while the statute applies to trees, that is, growing trees, at the time of their being taken or cut.

From the twentieth to the twenty-seventh sections, both inclusive, of 32-33 Vic. ch. 21, these sections have the general heading, "*As to larceny of things attached to or growing on land.*"

The 20th section applies to *stealing* any articles ripped, cut, severed or broken belonging to any building, or fixed in or to any building, or fixed in land, or for a fence to any dwelling house, &c., or any street, &c., for public use or ornament, or in any burial ground.

The 21st section applies to *stealing*, &c., any tree, or any part of a tree, &c., *growing*.

The 22nd section applies to *stealing*, &c., trees, &c., *growing*.

The 23rd section applies to persons receiving or purchasing any tree, &c., or any timber.

The 24th section applies to *stealing*, &c., any part of any live or dead fence, or any post, pole, wire, or rail, set up or used as a fence, or any stile or gate, or any part thereof.

Then the 25th section provides, that if the whole or any part of any tree, sapling, or shrub, or any underwood, or any part of any live or dead fence, &c., is found in the possession, or on the premises, of any one, &c., he may be convicted before a Justice of the Peace.

The 26th section applies to *stealing*, &c., any plant, &c., *growing*, &c.

The 27th section applies to *stealing*, &c., any cultivated roots, &c., *growing*, &c.

Reading the 25th section in connection with the others, it seems that whatever trees, &c., &c., were made the subject of larceny, are, if found in the possession or on the premises of any one, to his knowledge, and without accounting for how he came by the same, to subject such person to a conviction for so having them.

And that a tree cut by the proprietor into cord-wood, and

taken away by some one after it has been made into cord-wood, is a mere larceny of goods and chattels, if stolen, and does not come within the 25th section of the Act, nor within the heading of these sections, "Things attached to or growing on land": *Eastern Counties R. W. Co. et al. v. Marriage*, 7 Jur. N. S. 53, 6 H. & N. 931, Additional Cases, American reprint.

The conviction is open to this objection, and it may also be defective for want of an allegation that the wood taken was of the value of twenty-five cents at the least.

The direction, that the defendant should pay "seventy-five cents for the wood," is not a finding that it was of the value of seventy-five cents.

If the 25th section should or does apply to trees cut by the owner, and lying on his land as he felled them, still the charge with respect to this cord-wood is not within the section, because cord-wood, though made from a tree, as an inch board or a wooden chair is, is not within the meaning of the section, any part of a tree, or, in the words of the Act, "the whole or any part of a tree."

The conviction must be quashed.

Rule to quash the certiorari discharged.

Rule to quash the conviction, absolute.

MCDONELL V. CANADA SOUTHERN RAILWAY CO.

Contract for construction of railway—Power to terminate by notice—Engineer's certificate—Work done after expiration of time—Quantum meruit.

The plaintiff contracted with defendants by deed to do certain work in the construction of their railway by the 1st of January, 1872. The contracts contained a provision that if, in the opinion of defendants' engineer, there were just grounds for apprehension that the work would not be completed *in the manner, and within the time in the contract specified*, it should be the duty of the engineer to serve a written notice upon the plaintiff, setting out the grounds of his apprehension, and specifying the manner, together with a reasonable time in which the plaintiff might cause such grounds to be removed, and if at the expiry of such time such grounds of apprehension were not removed, then the engineer should have full power to declare the contract forfeited by notice in writing.

The work was not completed by the time specified in the contract, but the plaintiff continued beyond that time, receiving estimates and payments under the contracts; and on the 16th of April, 1872, the engineer served a written notice purporting to be under the provision above set out, stating that in the engineer's judgment there were grounds for apprehension that the work to be done under the contract would not be completed in the manner and within the time specified: that the grounds were that the plaintiff had abandoned the work, and before abandonment sufficient men, &c., had not been employed; that such grounds might be removed by resuming work in five days, with a force sufficient to complete the work contracted for in sixty days from the date of the notice; and that unless such grounds of apprehension were removed in five days in the manner specified, the engineer would be at liberty to declare the contract forfeited. And by a subsequent notice the engineer declared the contracts forfeited accordingly.

The plaintiff thereupon brought his action on the common counts for work and labor and on the contract, &c. The case was referred to an arbitrator, and in answer to questions submitted by him to the court by a preliminary award, it was

- Held* 1, that the contracts could be put an end to under the above condition after the day fixed in them for the completion of the work, the parties having continued the work according to the contract, and as if the contracts still governed.
2. That the engineer had no power to decide conclusively whether the plaintiff's delay of which he complained was caused by defendants' acts and omissions, and that it was still open for plaintiff to prove that it was so caused before the arbitrator, as an answer to a plea setting up a determination of the contract by defendants' engineer under the provision.
 3. That the reasonableness of the time given by the engineer by his notice, was not a matter for him conclusively to determine, but was open to the consideration of the arbitrator.
 4. That the contract prices would govern even for work done after the 1st. of January, 1872, unless the plaintiff could shew distinctly that the work was worth more after that date, that the delay was not caused by his fault, and that he had not assented to such prices.
 5. That the plaintiff could recover for no work not certified and estimated for by the engineer, (the contracts providing that payment should be made on such certificates and estimates,) except that for work done after the 1st of January the estimate might be dispensed with, if a higher price could properly be charged.

SPECIAL CASE stated by an arbitrator, to whom the case was referred at the Toronto Fall Assizes of 1872, by Richards, C. J.

The action was brought upon two contracts entered into by the plaintiff with the defendants. By the first contract, dated the 1st of June, 1871, the plaintiff agreed to construct, grade, &c., sections one to twenty-two, both inclusive of the western division of the defendants' railway; and by the second contract dated the 11th of July, 1871, the plaintiff contracted to build the box culverts and rail fencing upon the same sections.

The declaration contained two special counts for not permitting the plaintiff to proceed with or complete the work under these contracts respectively, and common counts for work and labor done, &c.

Each contract contained the following, among other provisions :—

“ 1st. The work shall be commenced within ten days after the execution of this contract, or as soon thereafter as the right of way is obtained, and must be completed on or before the 1st day of January, A.D. 1872.

“ 2nd. The said party of the second part (the plaintiff), shall perform all the work and furnish all the materials necessary to fully complete the clearing and grubbing, grading and ditching, (or the box culverts and rail fencing,) so as to prepare the road-bed for the reception of the superstructure on the above named sections; and that the said work shall, in all particulars, be made to conform to the plans and specifications of the engineer, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined, and who shall have full power to reject and condemn all work or materials which in his opinion do not conform to the spirit of this agreement; and shall decide every question which may or can arise between the parties relative to the execution thereof, and his decision shall be conclusive.”

“ For the purpose of avoiding all cause of difference or

dispute between the parties to this contract, relative to its true intent and meaning, and for the purpose of adjusting in an amicable manner, any difference that may or can arise relative thereto, it is mutually understood and agreed as follows, to wit :

“ 1st. * * *. 2nd. * * *. 3rd. “ If the party of the second part refuse or unreasonably neglect to remedy any imperfections which may be pointed out by the engineer, or in any manner violate the conditions of this contract, so that in the judgment of the engineer there shall be just grounds for apprehension that the work will not be completed in the manner and within the time herein specified, then it shall be the duty of the engineer to serve a written notice upon said party, setting forth the grounds for his apprehension, and specifying the manner, together with a reasonable time in which said party may cause such grounds to be removed ; and if at the expiration of such time said grounds of apprehension be not removed, then full power and authority is hereby mutually vested in said engineer to declare this contract forfeited ; and on such declaration being given in writing by the engineer to the parties hereto, this contract shall determine immediately, and the said party of the first part may for ever retain the reserved percentage on account of the consideration for damages which they may have sustained by reason of the forfeiture of this contract ; or as an alternative to a declaration of forfeiture the party of the first part shall, on written report of the engineer that apprehensions are entertained that this contract will not be completed in the time and manner herein stipulated, have the right to take such measures as may be deemed by the engineer necessary to insure the completion of the work in the time and manner herein stipulated, and to deduct from the monthly estimates, and final estimate of work done under this contract, such sum or sums as may be required to defray the expenses of such measures. Among the measures which under such circumstances may be resorted to, are the execution by their own agents of such

portions of the work as the said engineer may select, or the requirement that the party of the second part shall provide for and employ in the most efficient manner such additional men, carts, teams, &c., as the party of the first part shall furnish, in which case said party of the second part agrees to employ said men, carts, teams, &c., in the manner directed by the engineer.

"4th. It is further mutually agreed between the parties hereto, that nothing herein contained shall be construed into a liability for damages on the part of the first party hereto, should the whole or any part of the work under this contract be for any reason suspended or delayed; and in no event will the party of the second part have right to claim extra compensation, or price for damage arising from such suspension or delay of operations of said work."

The defendants by their second plea, set up: That the alleged agreements or contracts were reduced into writing and signed and executed by the plaintiffs and defendants respectively, and were made subject to certain terms or conditions then agreed on, by and between the plaintiff and the defendants, and contained therein, that is to say, amongst others, that the plaintiff should commence the works in the said counts mentioned within ten days after the execution of the said respective contracts, and have such works fully completed in the manner in the said contract specified on or before the 1st day of January, 1872; and that the plaintiff should be paid therefor at the prices in the said contracts mentioned and not otherwise; and that estimates should be made during the progress of the said works on or about the 1st day of each month; and that the payments should be made by the defendants upon the estimates and certificates of the engineer of the said defendants, on or about the 15th day of each month, for the amount and value of work done and materials provided during the previous month; ten per cent. of such amounts being deducted and retained by the defendants until the final completion of the works embraced in the said contracts; and, further, that if the plaintiff should

refuse or unreasonably neglect to remedy any imperfections in the said works which should be pointed out by the engineer of the defendants, or in any manner should violate the conditions of the said contract so that in the judgment of the engineer of the defendants, there should be just grounds for apprehension that the said works would not be completed in the manner and in the times in the said contract specified, then it should be the duty of the engineer of the defendants, to serve a written notice upon the plaintiff, setting forth the grounds of the said engineer's apprehension, and specifying the manner together with a reasonable time in which the plaintiff might cause such grounds to be removed; and if at the expiration of such time, said grounds of apprehension should not be removed, then full power and authority were by the plaintiff and defendants, under and by virtue of the terms of the said contract, vested in the said engineer to declare the said contracts forfeited; and on such declaration being given in writing by the said engineer to the plaintiff, the said contracts should determine immediately, and the defendants might for ever retain the reserved per centage on account of the consideration for damage which they might have sustained by reason of the said causes for the forfeiture of the said contracts; and, further, that nothing in the said contracts contained, should be construed into a liability for damages on the part of the defendants, should the whole or any part of the work under the said contracts be for any reason suspended or delayed; and that in no event would the plaintiff have a right to claim extra compensation or price for damage arising from such suspension or delay of operation of the said works. And the defendants say, that although they duly performed all conditions and things by the said contract on their part to be performed, the plaintiff did not fully complete the said contracts in the manner therein specified on or before the 1st day of January, 1872; but that after entering upon and commencing the said works,

and long before the completion thereof, the plaintiff wholly abandoned the said works, whereupon the said engineer of the defendants, in pursuance of the terms of the said contracts, caused notices to be served upon the plaintiff, setting forth that in the judgment of the said engineer there were just grounds for apprehension that the works to be performed by the defendants under the said contracts would not be completed in the manner and within the time specified; the grounds for such apprehension, the said notice stated, being that the defendant has abandoned the said works, and that a sufficient number of men and teams were not employed before the abandonment to complete the works within the time specified in the said contracts; and that such grounds of apprehension might be removed by the plaintiff resuming the said works within five days with a sufficient force to complete the work embraced in the said contracts within sixty days from the date of the said notice, and unless so removed within five days after the service of the said notice, the said contracts would be declared forfeited, or the defendants would take such steps as they might deem necessary to insure the completion of the said works in the manner stipulated for in the said contracts; and the plaintiff thereupon failed to comply with the said requirements of the said engineer, and therein wholly made default; and thereupon, the said requirements of the said engineer contained in the said notices to the plaintiff not having been complied with, the said engineer, as he was entitled to do, declared by further notice in writing, duly served upon the said plaintiff, the said contracts to be forfeited and determined; and that the defendants would at once enter upon the work covered and included in the said contracts, and complete the same as they should deem best, and for ever retain the ten per cent. therefor reserved, in accordance with the terms of the said contracts.

The plaintiff replied: 1. That he did not, after entering upon and commencing the said works, abandon the said works as in the plea alleged, but, on the contrary thereof,

was ready and willing to proceed with the same as in the declaration alleged : that the alleged abandonment in the plea mentioned, and the grounds for apprehension that the works to be performed by the plaintiff under the said contracts, would not be completed in the manner and within the time specified, were caused and occasioned by the acts and orders, and by the neglects, defaults, and hindrances of the defendants and their engineers and servants, in delaying to deliver the requisite plans to the plaintiff; in delaying to set out the requisite lands for the plaintiff's work; in delaying to define the defendants' line of railway; and in delaying to give the necessary directions and particulars under the said contracts, to enable to plaintiff to proceed with the works under the contracts, and by breaches of the contracts on the defendants' part and not otherwise.

2. That the time limited in the said notices served upon the plaintiff by the engineer of the defendant for the resumption of the said works by the plaintiff, and for the removal of the said grounds of apprehension of the said engineer, as in the said plea alleged, was not a reasonable time in that behalf.

The action was referred at *Nisi Prius*, by an order of reference which provided that the arbitrator, after entering upon the reference, might make a preliminary award, stating the facts necessary to raise any questions of law which he might think it desirable to have determined by the Court before proceeding with the reference; and that the opinion of the Court might be taken on such questions before proceeding with the rest of the reference.

Under this power, the arbitrator stated a special case, of which the material facts found by him were as follows:—

That the plaintiff had not completed the work to be done under either of the said contracts, by the 1st day of January, 1872, but he continued to work under such contracts, and received estimates and payments on account of such work both before and after that day.

That upon the 16th of April, 1872, the defendants served upon the plaintiff the following notice:—

"CANADA SOUTHERN RAILWAY COMPANY.

NOTICE TO CONTRACTORS.

Chief Engineer's Office,

Fort Erie, April 16th, 1872.

John McDonell, St. Thomas, Ont.

Sir—In accordance with the third Article of your contract with the Canada Southern Railway Company, bearing date June 1st, A.D. 1871, you are hereby notified that in my judgment there are just grounds for apprehension that the work to be performed by you under said contract will not be completed in the manner and within the time specified. The grounds for this apprehension are as follows, to wit:—That you have abandoned the work, and that a sufficient number of men and teams were not employed before the abandonment to complete the work within the time specified in your contract. And such grounds of apprehension may be removed in the following manner: that you resume work within five days with a force sufficient to complete the work embraced in your contract within sixty days from this date. And unless such grounds of apprehension are removed within five days after the service of this notice in the manner herein specified, I will be at liberty to declare the said contract forfeited, or the Canada Southren Railway Company may take such steps as I may deem necessary to ensure the completion of the work in the manner stipulated for in the said contract.

Yours, &c.,

(Signed) F. N. FINNEY, *Chief Engineer.*"

That upon the 22nd day of April, 1872, the following notice was served by the defendants on the plaintiff:—

CANADA SOUTHERN RAILWAY COMPANY.

"DECLARATION OF FORFEITURE OF CONTRACT.

Fort Erie, April, 1872.

John McDonell, St. Thomas, Ont.

Sir,—The instructions contained in my notice of the 16th day of April, 1872, not having been complied with, I hereby declare your contract with the Canada Southern Railway Company, bearing date June 1st, A.D. 1871, forfeited and determined, and the said Canada Southern Railway Com-

pany will at once enter upon the work covered and included in said contract, and complete the same as it may be deemed best by them, and they will forever retain the ten per cent. heretofore reserved in accordance with the terms of the third Article of said contract.

Yours, &c.,

(Signed) F. N. FINNEY, *Chief Engineer.*"

That both said notices were signed by the defendants' chief engineer.

That it was alleged by the plaintiff that the time specified in the first mentioned notice within which the grounds for apprehension set forth therein might be removed by the plaintiff, was not a reasonable time; and the evidence given by the plaintiff *primâ facie* established this allegation, and supported the plaintiff's first replication to the defendants' second plea.

It was objected on the part of the defendants, that under the said contracts it was for the engineer to determine whether the plaintiff or defendants were the cause of any delay in the progress of the work: that he must be taken to have considered this point before giving the first mentioned notice; and that his decision was final, not only as to the existence of the grounds of apprehension specified in the notice but also as to their origin, and as to the reasonableness of the time given to remove them.

For the plaintiff, it was answered that the condition in the contracts under which the defendants assumed to determine them could not apply, for the time specified in such contracts for the completion of the work had expired before the notices were served: that the defendants could not take advantage of their own delay as a cause of forfeiture; and that the contracts did not preclude the plaintiff from shewing that his want of due diligence of which the defendants complained was caused by defendants' own acts or neglect, or from shewing that the time given to him by the first mentioned notice for removing the alleged grounds of apprehension was not reasonable.

The plaintiff also contended that the defendants having

wrongfully put an end to the contracts and taken the work out of his hands, he was not bound by such contracts as to the work done, either with regard to prices or the necessity for producing certificates of the defendants' engineer; and that he could recover for such work as upon a *quantum meruit* upon the common counts, or by way of damages under the special counts, without producing such certificates or estimates.

The questions for the opinion of the Court, submitted by the arbitrator, were: Whether the contracts could be put an end to under the conditions therein contained after the day specified in such contracts for the completion of the work. 2. Whether, if they could be so determined, the engineer and he only is by such contracts empowered to decide whether the delay on the part of the plaintiff is caused by the defendants' own acts and omissions; or whether the fact that it was so caused may be alleged and proved by the plaintiff as a good answer to the defendants' second plea. 3. Whether the reasonableness of the time given by the first mentioned notice is a question to be determined only by the engineer, or one open for the decision of the arbitrator. 4. Whether, as regards the work already done, the plaintiff is confined to the prices mentioned in the said contracts; and whether he can recover for any work not estimated and certified for by defendants' engineer. These questions were submitted without reference to the sufficiency of the pleadings which were to be amended if necessary in order to raise such questions.

The case was argued during this term.

Harrison, Q. C., for the plaintiff. As to the notice given by the engineer, the plaintiff says he has not had a reasonable time, and it is open to him to shew it. The engineer was not judge of that: *Roberts v. Bury Improvement Commissioners*, L. R. 5 C. P. 310; S. C., L. R. 4 C. P. 755; *Davies v. The Mayor, Aldermen, and Burgesses of the Borough of Swansea*, 8 Ex. 808. It is sought to hold us whether defendants are in default or not: *Pontifex et al. v. Wilkinson*,

1 C. B. 75; S. C. 2 C. B. 349; *Holme v. Guppy*, 3 M. & W. 387. The notice should have been given within the time in which the work was to have been completed, viz: 1st January, 1872. The Court will not extend such a provision as this, and there is nothing to shew that the engineer's power was to extend beyond the contract time. He also cited *Halley v. The Mayor of Bristol*, 10 Ex. 307; *Philadelphia, Wilmington, and Baltimore Railway Co. v. Howard*, 13 Howard 307; *Jay v. The South Eastern Railway Co.*, (Weekly Notes, 18th January, 73, p. 4.) The engineer was to give two notices; one to require the plaintiff to remove the grounds of apprehension that the work would not be completed in time; and the second to conclude the contract. In the first he was to state a reasonable time. He was not made the judge of that time. He ought not to be the judge of the reasonable time, because it might turn out as it is here, that he would be judge of his own default; the engineer it was who omitted to stake out the road and furnish the plans, and consequently the plaintiff could not go on.—[RICHARDS, C. J.—Must you not shew us that it was the engineer's duty to stake out the road and deliver the plans within the time the contract was running?—This agreement is no bar to the arbitrator even if he is a judge. He never adjudicated upon a reasonable time. All that has been shewn is an executory agreement. It should be shewn that the question was referred to the engineer, and that he decided it; there is no pretence of that: *Wood v. The Governor and Company of Copper Miners of England*, 25 L. J. C. P. 166; *Cooke v. Cooke*, L. R. 4 Eq. 77. The plaintiff also contends that he is entitled to be paid as on a *quantum meruit*. It is contended on the other hand that, though the contracts have been departed from, yet the contract prices are to govern: *Ranger v. Great Western R. W. Co.*, 5 H. L. Cas. 72. This case forms an exception to the general rule. A man may be willing to do the whole work at a lower rate than he would do part. It may be a loss to do part only. The plaintiff can recover on the common counts for the value of

the work actually done, and damages for delaying the work on the other counts. The contracts were rescinded to all intents and purposes. The plaintiff could not have done the work in the winter for the same price as at the time the contracts contemplated, and he is not bound to do so : *Prickett v. Badger*, 1 C. B. N. S. 296 ; *Inchbald v. Western Neilgherry Coffee, Tea, and Chinchona Plantation Co. (Limited)*, 17 C. B. N. S. 733 ; *De Bernardy v. Harding*, 8 Ex. 822 : *Barrow v. Arnaud*, 8 Q. B. 595, 609 ; *Abbott's National Digest*, vol. II. 89 ; *Dermott v. Jones*, 2 Wall 1 ; *Gilpins v. Consequa*, 1 Peters C. C. R. 85 ; *Myers v. York and Cumberland R. R. Co.*, 2 Curtis C. C. 28 ; *Kimberley v. Dick*, 25 L. T. N. S. 476 ; S. C., 20 W. R. 49.

C.S. Patterson, Q. C., contra. The Company were under no contract to allow the contractor to go on without interference after the 1st January. It was implied up to that time, and that is all that can be said : *Davies v. Mayor, Aldermen and Burgesses of the Borough of Swansea*, 8 Ex. 808. If the Company are bound by the contract, then the plaintiff is also bound as to prices by the contracts ; if the contract survived, it must survive subject to the powers of the engineer. *Holme et al. v. Guppy*, 3 M. & W. 387, is an authority that there was no continuing contract, and if any then one to be carried on on the terms of the original. We did not interfere during the contract time, but we did with the work after that time. That interference we may be liable for, but not as on an executory contract for preventing its completion. There is no contract obligatory on defendants, except so far as relates to work done before the 1st of January. As to the question of *quantum meruit*, see *De Bernardy v. Harding*, 8 Ex. 822 ; *Munro v. Butt*, 8 E. & B. 738, 754 ; *Tyrell v. Gamble*, 12 U. C. R. 669. It was, under the contract, for the engineer to say what was a reasonable time. As to being judge in his own case, it was clearly the intention of both parties to put the whole matter in the engineer's hands. He was not like an arbitrator, and was not to hear evidence. He was to

use his discretion : *Ranger v. Great Western R. W. Co.*, 5 H. L. Cas. 72, 89 ; *Stadhard v. Lee et al.*, 3 B. & S. 364 ; *Roberts v. Bury Improvement Commissioners*, L. R. 5 C. P. 310, apply.

R. A. Harrison, Q. C., in reply. The point, that there was no duty cast upon the defendants after the 1st of January, was not raised before the arbitrator, and could not be raised on the pleadings. The contracts are not traversed, and defendants admit them. We were permitted to proceed, and there was a contract from the circumstances of the case, that they would permit us to complete it in a reasonable time.

WILSON, J., delivered the judgment of the Court.

The first question of the arbitrator depends on the following state of facts:—The work claimed in the first count was agreed to be done under a contract, dated the 1st of June, 1871, and in the second count was agreed to be done under a contract, dated the 11th of July, 1871, and it was all to be done by the 1st of January, 1872.

The first contract related to the grading on sections one to twenty-two, both inclusive ; the second contract related to box culverts and rail fencing on the same sections. The contracts provided. (Here the learned Judge read the third provision of the contract as set out above.)

The defendants allege, and the arbitrator has found, that the plaintiff did not do the work by the 1st of January, 1872.

The engineer, on the 16th of April 1872, served a written notice on the plaintiff, professing to be under the above third article. (Here the learned Judge read the notices and the plea and replication set out above, and proceeded)

The work not having been performed by the day named, both parties, from some cause or other, have continued since the expiration of that time to proceed upon these contracts, as if the day for completion of the works had been extended to a later period.

After the 1st of January, 1872, whatever work was done which is specified in these contracts, both of which are under seal, was not done under them; but we see no reason for saying that it was not done according to their terms, so far as the same could, properly and reasonably, be made applicable to the new or prolonged work or contract.

Just as a lessee, who holds over after the end of his term, or who holds under a void deed or instrument, is presumed to hold according to the provisions of the former lease, or of the void instrument.

In *Finch v. Miller*, 5 C. B. 428, a tenant after the expiry of his term occupied, by agreement, for another year, and it was held, that it must be assumed he was also to pay a forehand rent, because that was the mode of payment of his former tenancy.

So a waygoing crop may be presumed to be the right of the tenant who occupies after the expiration of his specified term: *Hyatt v. Griffiths*, 17 Q. B. 505.

And the cropping a farm in a particular manner, after the end of the term, was held to be regulated by the lease which was in force during the term: *Doe d. Thompson v. Amey*, 12 A. & E. 476.

For a parol lease may be as special in its terms as a written one: *Lord Bolton v. Tomlin et al.*, 5 A. & E. 856, 864.

Now such continued work must, after the first of January, be presumed to have been intended and agreed to between the parties to have been performed and completed by some time. A specific day was not named. The law therefore provides, and the parties themselves must have contemplated, that a reasonable time should be allowed to the plaintiff for that purpose.

The parties may also, I think, be said to have intended that the engineer in charge of the work should superintend and control it in all respects as before the 1st of January. So that if he saw the plaintiff dilatory or neglectful over it, and he was of opinion the plaintiff could not finish it within a reasonable time, he should notify the plaintiff to proceed more rapidly, or remove the plaintiff altogether, and take possession of the work for the defendants.

Suppose the original contracts had contained all their present stringent provisions, but had expressed no time within which the work should be completed, there would have been under the contracts the same state of things, which there is now since the expiration of the contracts; but there would still have been no invincible difficulty in acting under and in giving effect to the notice in question, as well as to the other special provisions of the contracts.

• I am therefore of opinion the contract for the work done since the 1st of January, 1872, if the parties were still treating it as in force, and acting by it, could be put an end to by a notice given in the terms of the contracts.

As to the second question, the case of *Roberts v. Bury Improvement Commissioners*, L. R. 4 C. P. 755, and in the Ex. Ch.; L. R. 5 C. P. 310, is an authority that the following words in the contract in that case did not make the architect a judge to determine whether the defendants did or did not delay the plaintiff in the prosecution of his work, and that if they did delay him they could not forfeit his contract because the architect had decided they did not delay him :—"That it shall be lawful for the said burial board, in case the said contractor shall fail in the due performance of any part of his undertaking, or shall become bankrupt or insolvent

. . . . or shall not in the opinion and according to the determination of the said architect exercise due diligence, and make such progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid, to determine the contract by a notice in writing," &c.

The provision in this case, although it begins with the preamble before mentioned, does not, we think, constitute the engineer a judge or referee to decide whether or not the defendants did or did not delay the plaintiff in the course of his work. The engineer had plainly the right to determine that in his opinion there were grounds to apprehend that the plaintiff would not complete his work in the manner and within the time specified; but if he came to

that conclusion when and by reason of the plaintiff having been improperly retarded by the defendants, or by the engineer himself, it would be an exercise in excess of his power. If, however, he came to the conclusion he did, because he had determined that neither the defendants nor himself had delayed the plaintiff; while that would be a just and proper exercise of power on his part, it would not be conclusive between the parties, but a matter traversable and enquirable into in an action. *

And that is the answer to the second question.

As to the third question. The contract provides, that in the written notice to be given it shall set forth the grounds of the engineer's apprehension that the work will not be completed in the manner and within the time mentioned in the contract, and it shall specify the manner together with a reasonable time in which the plaintiff may cause such grounds of apprehension to be removed, and if the plaintiff fail to do that, then the contract may be declared to be forfeited.

The part of the notice which is objected to is as follows : "That you resume work within five days with a force sufficient to complete the work in your contract within sixty days from this date, and unless such grounds of apprehension are removed within five days after the service of this notice, in the manner herein specified, I will be at liberty to declare the said contract forfeited," &c.

The engineer has stated the manner in which the plaintiff may cause the grounds of apprehension he entertained to be removed, and he should have stated *a reasonable time* within which the plaintiff should so remove his apprehensions.

In many cases, a certain number of days is specified in the contract. That is not so here; nor is it said that the time shall be such as the engineer may think to be reasonable.

And we are therefore of opinion, the question of reasonableness of time has not been left to be, and cannot be, determined conclusively by the engineer.

Stadhard v. Lee, 3 B. & S. 364, does not apply.

If the notice had conformed strictly to the terms of the contract, by simply requiring the plaintiff to remove the grounds of apprehension from the engineer's mind, it might perhaps have appeared sufficiently that the five days were a reasonable time, because his apprehensions might have been removed by a verbal assurance, on which he might have depended, that that which was engaged to be done would be fully and promptly carried out. The apprehension entertained might be removed by a verbal explanation or assurance as well as by other means.

But here the engineer has required the plaintiff to remove his apprehension, "in the manner herein specified," that is, by putting on, within five days, a force sufficient to finish the work in sixty days. All that may be perfectly reasonable, but it is open to the opinion and judgment of the arbitrator.

As to the fourth question, so far as it relates to the work already done by the plaintiff, we are of opinion that, *primâ facie*, the prices of the contract are to govern, even for the work done since the 1st of January, 1872, because the work continued beyond that time would be presumed to be done by and according to the contract stipulations, so far as they could be made to apply.

But if the plaintiff made it distinctly appear that there was, and is, a difference of price in work such as he engaged to do, when done between January and April, from what there was, and is, between June and January, he might recover for the higher value, if the delay were occasioned not by his act or default.

That, however, may be subject to further considerations. If, after the 1st of January, the plaintiff continued on, rendering accounts or accepting estimates and certificates upon the contract prices, or if in any way he assented to the rates, or led the engineer to believe he was going on under these rates, that would be strong, if not conclusive, evidence against his right to make any higher charge.

As to all work done before the 1st of January, and which

was done under the contracts, the plaintiff, as to prices, must be governed by the contracts: *Ranger v. Great Western Railway Co.*, 5 H. L. Cas. 72.

If he were delayed in his work by the defendants, that will constitute no ground for increasing his prices, but it may afford him a cause of action for damages caused by such delay, in which the higher value of the work may be recoverable: *Ibid.*

This is not always a very easy matter to determine. It is clear, however, when work is not done under a contract, and there arises an implied contract to pay for that work, the way the claim is commonly made is for measure and value, or, what is the same thing, on a *quantum meruit*; but that *quantum* may as well be fixed by the old contract, if both parties have been still regarding it, as by any other means; and in such a case it is the proper way to fix it. It is always a question of fact how the work has been carried on between the parties. The cases on this point are *De Bernardy v. Harding*, 8 Ex. 822; *Prickett v. Badger*, 1 C. B. N. S. 296; *Inchbald v. The Western Neilgherry Coffee, Tea, and Chinchona Plantation Co. (Limited)*, 17 C. B. N. S. 733.

As to the remaining part of the question, whether the plaintiff can recover for any work not estimated and certified for by the engineer, we are of opinion that the terms of the contract must still govern in some respects in that particular. The certificate we conceive to be still necessary, but not the estimate, for work done since the first of January, if a higher price be properly claimed and allowed; but if the work done since that day should be held to have been carried on according to the contract, so far as it can be fairly applied to such work, I do not know why the work should not be estimated, certified, and paid for, in like manner and at the like periods as before the 1st of January.

These are our answers to the four questions submitted to us by the arbitrator.

MCCULLOCH V. WHITE.

Arbitration—Submission by deed—Award after time limited—Parol enlargement by parties—Power of arbitrators to fix their own costs.

The declaration set out in full a deed of submission to arbitration between plaintiff and defendant, which deed provided that the award should be made on or before the 1st of July then next, or such further time as the arbitrators by writing, endorsed on the submission, might from time to time appoint; that the arbitrators might award what each of the parties should do; and that the costs should be in the arbitrators' discretion. It was then averred, that after the arbitrators had entered upon the reference the plaintiff and defendant, by writing under their hands, enlarged the time for making the award to the 1st of December, and the award was made on the 30th of November; that the award directed the defendant to pay the plaintiff \$1,135 50, and fixed the arbitrators' costs at \$150, \$30 thereof to be paid by the plaintiff, and \$120 by defendant: that the plaintiff paid the whole \$150; and that all conditions were fulfilled, &c., yet that defendant did not pay either the \$1,135 50 or \$120.

4th plea—That the enlargement mentioned was not made till after the 1st of July, and when the arbitrators' authority to award had ceased.

9th plea—That as to so much of the declaration as related to the sum of \$150 the award was not certain, or final.

Replication to the 4th plea—Setting out the endorsement by the parties enlarging the reference, and averring that the parties, with a full knowledge of the facts, appeared subsequently before the arbitrators, and proceeded with the reference, &c., without any objection being raised to the enlargement, and afterwards the award was made as in the declaration mentioned.

Held, upon demurrer, 1. that the action, if founded upon the deed, must fail, the enlargement not being in accordance with the deed; but

2. That setting out the deed in the declaration did not necessarily make it the basis of the action, for it might be treated as inducement; and the deed and the circumstances following it, read together, shewed a valid award on a parol submission by the parties, and afforded a good cause of action.

The declaration was therefore held good, as regarded the enlargement, and the fourth plea bad.

3. That the arbitrators had no power to fix the amount of their fees, and so far the declaration was bad.

4. That the replication was not a departure; but that as the declaration shewed a new submission by the parties, the facts in the replication as to the attendance of the parties after the enlargement were immaterial, and the replication therefore bad.

DECLARATION—That the plaintiff and defendant, on the 11th of May, 1872, entered into an agreement, under seal, which agreement was set out *verbatim* in the declaration, and by which it appeared that the plaintiff and defendant referred all matters in difference between them relating to the affairs of the partnership which had theretofore subsisted between them, to the award of William Toole and John Bertram, and such third person as these two should

by writing under their hands, endorsed upon the submission, before entering on the reference appoint; so that the arbitrators, or any two of them, should make their award in writing of and concerning the premises ready to be delivered to the parties, or either of them, or their personal representatives, in case of death, requiring the same, on or before the 1st day of July then next ensuing, "or such further time as they, the said arbitrators, or any two of them, by writing endorsed on these presents (the submission) may from time to time enlarge the time for making the award."

And it was also agreed that the arbitrators might by their award order what they should think fit to be done by either of the parties respecting the said matters; and that the costs of the reference and award should be in their discretion, who might award by whom and to whom, and in what manner the same should be paid.

Then followed the usual clauses contained in ordinary references.

The declaration then averred, that William Toole and John Bertram accepted the burden of the reference, and that they duly appointed James Albro Hall as the third arbitrator, who accepted the appointment; and that afterwards the plaintiff and defendant did, by writing under their respective hands, enlarge the time for making the award until the 1st day of December, 1872; and that Bertram and Hall afterwards, and before the 1st day of December, to wit, on the 30th day of November, made their award in writing of and concerning the premises, ready to be delivered to the parties; the said Toole having refused to join therein, although requested so to do. And they awarded that there was due and owing from the defendant to the plaintiff the sum of \$1,135 50, which they directed the defendant to pay to the plaintiff forthwith. And they found there was no sum of money whatever then due in respect of the matters in difference by the plaintiff to the defendant; and they directed the defendant should

indemnify the plaintiff from all liabilities of the partnership, and that the payment of the money thereby awarded to be paid, should be a final adjustment of all the said matters. And they fixed the costs and charges of the arbitrators, including expenses of accountants and experts in examining books and papers incurred by them, and of their award, at \$150; and that \$120 of the same should be paid by the defendant, and \$30 of it by the plaintiff. And if the defendant paid the whole \$150, that he should be credited with the sum of \$30 as having been paid on account of the sum of \$1,135 50. And if the plaintiff paid the whole of the \$150, that the sum of \$120 should be added to the \$1,135 50, to be paid by the defendant, which would make the sum of \$1,255 50 to be paid by the defendant to the plaintiff.

The declaration then further averred, that the plaintiff paid the whole of the \$150; and that all conditions were fulfilled, &c., yet the defendant did not pay the sums of \$1,135 50, and \$120, or either of them.

The common counts were added.

The defendant pleaded, as a fourth plea, that the enlargement in writing of the time for making the award in the declaration mentioned, was not made until the 1st day of July, being the day in the submission mentioned for the making of the award, and was made at a time when the authority of the arbitrators to make the award had ceased.

And, as a ninth plea, as to so much of the declaration as related to the \$150, setting out the award as far as it related thereto that the award in respect thereof was not certain or final.

Replication to the fourth plea: That the enlargement in writing of the time for making the award in the declaration mentioned was endorsed on the submission, and was as follows: "We hereby enlarge the time for making the award pursuant to the within reference until the 1st day of December next. Dated this 19th day of November, 1872.

(Signed)

{ WM. McCULLOCH,
{ SAMUEL WHITE.

And the plaintiff averred, that thereafter the plaintiff and defendant, with a full knowledge of all the facts and circumstances, attended several meetings of the arbitrators, and in the presence of each other, and of all the arbitrators, proceeded with the reference by examination of the parties and of witnesses, and of books and papers, and with the arguments of counsel on behalf of each of the parties, without any objection being raised to the sufficiency of the said enlargement or submission, and thereafter the said award was made in manner and at the time in the declaration mentioned.

Demurrer to the ninth plea : because it is pleaded in bar, and it does not traverse any material allegation in the declaration ; nor does it confess and avoid that part of the declaration to which it is pleaded.

2. It simply reiterates the allegations in the declaration, and does not shew any new facts disclosing the want of finality or uncertainty.

3. The allegations of fact in the declaration and ninth plea shew the award to be sufficiently certain and final as to the matters in the said plea contained. Joinder.

Demurrer to the replication to the fourth plea, because :

1. It confesses the plea without sufficiently avoiding the same.

2. It does not shew any sufficient enlargement of the time for making the award to enable the plaintiff to sustain his declaration.

3. The enlargement in the replication is a departure from the declaration.

4. The replication sets up a parol alteration of the terms of an instrument under seal. Joinder.

The plaintiff gave notice of the following exceptions to the fourth plea :—

1. That it confesses the different matters set out in the declaration, and does not sufficiently avoid them.

2. That it was competent and sufficient to enlarge the time for making the award in the manner set out, even after the 1st day of July.

3. That, if the enlargement were not sufficient as such, it was good as a new submission.

The defendant gave notice of exception to the declaration on the following grounds :—

1. That no valid award was shewn.

2. That the award was not made on or before the 1st day of July next ensuing the date of the submission, or within such further time as the arbitrators or any two of them by writing endorsed on the deed enlarged the time for making the award.

3. That the award was made after the 1st day of July, and no fresh enlargement as last mentioned was shewn.

4. That no proper enlargement of the time for making the award was shewn in the declaration.

5. That it was not shewn whether the enlargement was before or after the 1st day of July ; if before, then the plaintiff was relying on a parol alteration of a deed ; if after, then a new submission would be shewn by parol and not the deed in the declaration mentioned.

6. That, if the enlargement be intended to be taken, not as a new submission, but as a waiver of the deed, no such waiver was alleged, and if alleged, yet not being by deed, it would not be sufficient.

7. That the plaintiff was attempting by parol to vary the terms of a contract under seal, which was the foundation of the action.

8. That the arbitrators had no power to fix the costs of the arbitrators, including expenses of accountants, &c., at the sum of \$150, or to award that the same or any part thereof should be added to the sum of \$1,135.50.

The defendant also gave notice of exception to so much of the declaration as related to the \$120 before mentioned, because :

1. The arbitrators had no power to make such an award.

2. The arbitrators had no power to fix the amount of the costs, and without control to award money to themselves.

3. The arbitrators have no power under any circumstances to determine the amount of costs.

The demurrers were argued during this term. *J. K. Kerr*, for the plaintiff. This declaration is not upon the deed, although the deed is set out in it at full length. The action is on the award: *Sexton v. Woods*, 15 U. C. R. 585; *Smith v. Trowsdale et al.*, 3 E. & B. 83. The defendant by pleading over has cured any objection to the declaration in that respect.—*Chitty* on Pleading, Vol. I. 7th ed., 671, 703. The enlargement in the declaration was a good enlargement, not according to the terms of the deed, but as constituting a new and a valid submission, the action not being upon the deed, but in accordance with the terms specified in the deed: *Smith v. Trowsdale et al.*, 3 E. & B. 83; *Benwell et al.*, *Hinaman et al.*, 1 Cr. M. & R. 935; S. C. 5 Tyr. 509; *Tyerman v. Smith*, 6 E. & B. 719; *Stephens v. Lowe*, 9 Bing. 32; *Lord v. Lee*, L. R. 3 Q. B. 404; *Hallett v. Hallett*, 5 M. & W. 25; *Greig v. Talbot*, 2 B. & C. 179; *Russell* on Awards, 4th ed., 134; *Evans v. Thompson*, 5 East 189.

The award as to the \$150 was not invalid. The arbitrators had the right to avail themselves of the skill and special knowledge of others. If the sum were too great it could be referred for taxation under 29 Vic., ch. 32, sec. 5. Under any circumstances it could be separated from the rest of the award if objectionable, and the other parts of the award would stand good: *Laurie v. Russell*, 1 P. R. 65, 67; *Towsley v. Wythes*, 16 U. C. R. 139; *Glen v. G. T. R. Co.*, 2 P. R. 377; *Roberts v. Eberhardt*, 3 C. B. N. S. 482; *Thorp v. Cole*, 4 Dowl. 457; *Hawkins v. Rigby et al.*, 8 C. B. N. S. 271; *Anderson et al. v. Wallace*, 3 Cl. & Fin. 26; *Threlfall v. Fanshawe*, 1 L. M. & P. 340; *Rose v. Redfern*, 10 W. R. 91; *Russell* on Awards, 4th ed., 197, 361, 362, 673.

Harrison, Q. C., contra.—The reference here having been by deed, and the enlargement of the time not being according to the provisions of the deed, and having been by parol, the reference is at an end, and the parol enlargement is void: *Brown v. Goodman*, in the note to *Littler v. Holland*, 3 T. R. 592; *Sexton v. Woods*, 15 U. C. R. 585;

Ruthven v. Ruthven, 8 U. C. R. 12, A deed cannot be altered by anything but a deed: *Thompson v. Brown*, 7 Taunt. 656; *Bricker v. Ancell*, 23 U. C. R. 481. The account stated will not help the plaintiff, for it will not be supported by proof of an award: *Bates v. Townley et al.*, 2 Ex. 152.

As to the \$150, the award as to it is void, for an arbitrator cannot award what sum shall be his own fees. He is a judge, and it is contrary to reason he should decide a matter for himself: *Re Combs et al.*, 4 Ex. 839; *Roberts v. Eberhardt*, 3 C. B. N. S. 482; *George v. Lousley*, 8 East 13; *Robinson et al. v. Henderson et al.*, 6 M. & S. 276. The last case is particularly applicable here; for in that case, as in this, the arbitrators had awarded themselves a specific sum by way of recompense, and to cover certain other damages; and the Court said, "there would be danger in permitting arbitrators to award a definite sum of which a part, including an indefinite allowance to themselves, was ordered to be paid to the arbitrators."

The sufficiency of the ninth plea in form is supported by *Wood v. Wilson*, 5 Tyr. 813.

The replication is objectionable as a departure from the declaration. The declaration alleges a parol enlargement of the time. The replication alleges in addition to that, that the plaintiff and defendant afterwards attended the meetings of the arbitrators, examined witnesses, &c., without any objection. It is in the nature of an estoppel, and yet not pleaded as such: see *Stephen on Pleading*, 6th ed., 331; *Reis et al. v. The Scottish Equitable Life Assurance Co.*, 2 H. & N. 19; *Mole v. Wallis*, 1 Lev. 81.

Kerr, in reply, referred to *Perrin v. Perrin*, 32 U. C. R. 606, as to separating the award.—[RICHARDS, C. J.—It is on a different principle from that in *Perrin v. Perrin* that it is contended here that an arbitrator cannot fix the amount of his fees.]

WILSON, J., delivered the judgment of the Court.

There are only two questions to be determined in this case.

The first is, whether the enlargement which is mentioned in the declaration is sufficient or not or rather, is consistent with and supports the cause of action stated in the declaration ?

And the second is, whether the award as to the \$150 is valid or not ?

All the facts, or enough of them to enable these questions to be determined, appear upon the declaration. The defendant should, therefore, have demurred. Instead of doing so, he has pleaded two pleas ; and the plaintiff has replied ; and then there are demurrers to the fourth plea, and replication ; and notices of exception to the declaration and ninth plea.

To determine the first question, whether the enlargement is sufficient or not, depends upon first settling what the action is brought upon.

If it is brought upon the deed, then the enlargement is invalid as being a part of or as supporting that deed, because it is not such an enlargement as the deed required to be made. This is an enlargement in writing by the parties. The deed required it should be made in writing by the arbitrators, and be endorsed on the deed. And, as it is not in conformity to the deed, it is not, as it should have been to have been valid, irrespective of the provisions of the deed, made under the seals of the parties.

If the action is brought, not upon the deed of submission, but upon the award, then the enlargement may be maintained, as shewing a new submission entered into between the parties.

It is not disputed, that if the action be brought upon the deed, this suit must fail.

It is not always quite easy to say what the precise form of action is ; but it is quite evident that, as the plaintiff has brought his action, and the defendant has pleaded to it, we should so construe it as to enable them to have the controversy determined between them on the merits.

The present rule of construing pleadings is, to maintain them if they can be properly maintained : *The Thames*

Haven Dock and R. W. Co. v. Brymer et al., 5 Ex. 696; *Young v. Austen*, L. R. 4 C. P. 553; *Stanton v. Austin et al.*; L. R. 7 C. P. 651.

The declaration sets out the submission by deed *in extenso*; the enlargement of the time, which has been objected to; the making of the award within the extended time; the performance of all conditions by the plaintiff; and the breach of payment by the defendant of the said sums of money. The breach does not say the defendant did not pay the money, "according to the said covenant," nor, "according to the said award."

The deed contains a covenant by the parties to abide by and perform the award; so that, by the express terms of it, an action could have been brought upon the deed. And it is equally certain that an action could have been brought upon the award.

The whole suit must fail if it be held that the action is brought upon the deed. We are in favour of supporting the action rather than of defeating it, and we therefore hold that the setting out of the deed does not, necessarily, make it the basis of the action. It may be treated as matter of inducement.

The whole facts are detailed just as they occurred:—that a deed was made: that an enlargement "in writing under the hands of the parties" was made, and so not by deed, nor in accordance with, but contrary to, the deed; and that after that informal and inefficacious enlargement, so far as it could have any operation upon, or continuance of the deed, the arbitrators proceeded with the reference, and made an award. All these circumstances shew a good award founded upon a parol submission, not upon the deed, but in accordance with its terms; but they would shew a bad award if it is to be held as based upon the deed.

When the parties themselves, in writing under their hands, extended the time for making the award they had before provided for, they meant, it must be assumed, something. What was it? Was it that all they were doing, and all they were putting the arbitrators to do, was an idle

and useless proceeding; or was it that they meant to carry on and perfect the business they were professing to transact?

It is quite manifest they meant to give effect to their act and writing, and we should therefore construe this declaration so as to carry out the object and intention which they then had. The same deed which they had before them we have now. And we think that deed and the narrative of circumstances following it may be read together, as affording a good cause of action upon the substantial agreement of the parties, instead of upon the technical formality of a deed.

The case of *Smith v. Trowsdale*, 3 E. & B. 83, is, we think, a full authority, if one were wanting, upon this point.

The following authorities shew, that whether the original submission were by deed or not, that an enlargement of the time fixed by it, if not by deed, or according to the deed, is nevertheless sufficient to make a good substituted submission, and that all the terms of the original submission are continued by and incorporated with the new submission so far as they are applicable: *Lord v. Lee*, L. R. 3 Q. B. 404, 408; *Evans v. Thomson*, 5 East 189; *Re Hick et al.*, 8 Taunt. 694; *Leggett v. Finlay*, 6 Bing. 255; *Re Tunno et al.*, 5 B. & Ad. 488; *Greig v. Talbot*, 2 B. & C. 179; *Tyerman v. Smith*, 6 E. & B. 719.

If the replication be referred to, it shews the parties attended and conducted the reference before the arbitrators after the enlargement; but that was not required to be shewn, when the enlargement was made by the parties themselves.

The substantial ground of exception to the declaration fails.

The next question is, as to the sufficiency of the award so far as it relates to the \$150.

In *Re Coombs et al.*, 4 Ex. 839, the costs of the submission and reference and award were to be in the discretion of the arbitrators. The umpire awarded a gross sum of £527 7s.-

9*d.*, which included his own and the arbitrators' charges, amounting to more than £300.

In the course of the argument, Parke, B., asked, p. 841, "But what right has he to fix the amount of his fee in and by the award?" and he afterwards said, "The amount of his own fee is to be excluded by natural justice, for it is contrary to reason that an arbitrator or umpire should be sole and uncontrolled judge in his own cause. No doubt he has a lien upon the award for his services, or perhaps he might maintain an action for work and labour * *

In the present case the umpire has awarded a gross sum, and we cannot see how much of that is to go to him as his fee." And on page 842, "I think that the award is bad, on the ground that the umpire had no jurisdiction to fix his own fee and to direct the manner in which it was to be paid under the terms of this submission; and as that part of the award which is made without jurisdiction, is not separated from that portion of it which is so made, the award cannot be supported."

In *Roberts v. Eberhardt*, 3 C. B. N. S. 482, the costs of the reference and award were in the discretion of the arbitrator, and the same point is fully discussed. At page 493 Cockburn, C. J., said, "It certainly strikes one as quite contrary to reason that the arbitrator should not only settle the amount, but at once put his hands upon it." In the Exchequer Chamber Watson, B., said, p. 508: "It is true that an arbitrator cannot conclusively settle the amount of his own fee. But the invariable rule or practice of the profession,—and I believe of lay arbitrators also,—is, that the arbitrator fixes in the first instance the amount of his own fee, and retains the award until such fee is paid. * *

It is clear that any excess over a reasonable fee received by an arbitrator may be recovered back by action."

Bramwell, B., said, the arbitrator had no power to award himself anything, "on the simple ground that it is not expressly given to him, and that it is not to be intended that he is to be a judge in his own cause. * *

As arbitrator he could not by his award fix his costs, either

by a named sum, or otherwise; his award would be *pro tanto* void."

Erle, J., said, pp. 514, 515: "The arbitrator cannot judicially settle the amount of his own fee, whether he specifies it in his award or demands it orally from the parties. * * Whether the amount is stated in the award or demanded orally when the award is delivered out, the decision of the arbitrator on his own costs is always subject to some review, because he may not decide finally in his own favour."

Wightman, J., said, at p. 52: "Since the case of *In re Coombs*, 4 Ex. 839, it may be considered as settled, that an arbitrator has no power to award himself a sum for costs; but his doing so would only vitiate the award for the part respecting the costs to himself, unless that part is so connected with the rest of the award as to render it uncertain, or not final."

Crompton, J., said, at p. 522: "His award cannot be binding as to the amount which he has chosen to take for his award; and the party or parties from whose share he has taken it have a clear right to question the fairness of the amount."

On this subject I may refer also to *Marsack v. Webber*, 6 H. & N. 1; *Parkinson v. Smith*, 30 L. J. Q. B. 178; *Rose v. Redfern*, 10 W. R. 91.

There is nothing in the Act respecting arbitrators, 29 Vic. ch. 32, which affects this question. It permits and enables an arbitrator's fees to be taxed.

The claim of \$150 must therefore be pronounced against as a part of the award between the parties. The arbitrator cannot determine the amount of his own fees, is the point which is settled; and our statute does not impeach that principle.

It is, as said by Erle, J., in *Roberts v. Eberhardt*, 3 C. B. N. S., already referred to, at p. 515, "a matter in difference between him on the one side and the parties on the other, entirely distinct from the matters in difference between the parties which he is bound to decide finally by his award."

The declaration is therefore defective as to that portion of it which relates to the \$150.

The fourth plea we hold to be bad, for the reasons already given.

The ninth plea we hold to be good, for the reasons also already given.

The fourth replication, we think, is not open to the objection of being a departure from the count.

The declaration says the parties by writing extended the time for making the award. And the replication sets out the writing, and alleges that after it was made the arbitration proceeded by the parties attending before the arbitrators, &c., which is in substance only in affirmance of the count, that an award was made after the time had been extended.

It does not seem to me to be more an estoppel than the plea itself is. The plea admits the enlargement by writing, under the hands of the parties, but says the writing was not made till after the 1st day of July.

If the time be immaterial, as we think it is, then the defendant was as much estopped by his plea from setting up anything against a due and valid submission, as he could have been by his subsequent attendance and co-operation in the proceedings before the arbitrators.

The replication adds nothing in law to bind the defendant to perform the award, more than the plea does. I am of opinion the new facts stated in the replication are immaterial. The award was quite as good, although the defendant did not attend before the arbitrator after the enlargement, so long as the submission was in force and he was duly notified to attend, as if he had been present at every meeting. And it is obvious he had a knowledge of what was being done, when he personally enlarged the time to enable an award to be made.

The plaintiff would have been entitled to judgment *non obstante*, if he had succeeded on the other issues, and the defendant had succeeded on this one.

I am satisfied the replication is not a departure. The

various instances of that kind of defective pleading shew it is not.

One instance will answer : In debt on bond conditioned to perform the covenants in an indenture of lease, one of which was, that *at every felling of wood the defendant would make a fence*, the defendant pleaded *he had not felled any wood*. The plaintiff replied, that he felled two acres of wood, but made no fence. The defendant rejoined *that he did make a fence*. This was adjudged a departure : *Dyer*, 253 b. See, also, *Stephen* on Pleading, 6th ed., 331, referred to on the argument. I am satisfied, also, the plaintiff would be entitled to a judgment upon any issue joined upon it, *non obstante*. I think that any traverse of it, for instance, that *the defendant did not attend the meetings before the arbitrators and proceed with the reference by examining witnesses, &c.*, as alleged, would have been a useless traverse, and a departure on the part of the defendant.

The only question is, what is the value of the replication itself ?

It states nothing of any value. It is not an estoppel. Nothing contained in it could have prevented or should prevent the defendant from pleading as he did, that the writing was not made till after the 1st day of July, and was made at a time when the authority of the arbitrators had ceased. I rather think the replication must be considered as wholly useless in law, as it certainly is in fact. We must therefore hold it to be insufficient.

The conclusion is, there will be judgment for the plaintiff upon so much of the count as relates to the said sum of \$1135.50 ; and upon the demurrer to the replication to the fourth plea for the insufficiency of the plea.

And there will be judgment for the defendant upon so much of the said count as relates to the said sum of \$150, and upon the demurrer to the ninth plea.

Judgment accordingly.

SIMPSON V. KERR ET AL.

Building contract—Forfeiture for delay—Set-off—Equitable Pleadings—Parol discharge—Consideration.

Declaration for work and materials in construction of a house for defendants. Sixth plea: that by deed, dated 31st July, 1871, plaintiff covenanted to finish the works before the 31st of October, 1871, under a forfeiture of \$20 per week for every week the work was left unfinished after that day; that the plaintiff did not complete the works till 20 weeks after said date, and thereby \$400 became due from plaintiff to defendant, which defendants are willing to set off.

Fourth replication, on equitable grounds: That by the said deed the work was to be done to the satisfaction of S. & G., Architects, and if any dispute arose between the parties touching the works or the meaning of the contract, and it should be referred to S. & G., whose award should be final: that by the said deed, defendants agreed to pay the plaintiff \$3,037, on the certificate of S & G., 80 p. c. on the work and materials, as done and provided, and the balance one month after the whole had been completed, subject to any detraction for the non-fulfilment of the terms of the deed: that the plaintiff completed said works to the satisfaction of S. & G., without objection as to the time within which it was to be done, either from the architects or the defendants: that the architects certified from time to time, as provided in said deed, and on completion certified that the whole had been completed, and that the plaintiff was entitled to be paid for the same: that more than a month had elapsed after the last certificate was given: that no complaint was made by defendants after or before that certificate, or before suit, that the work had not been completed in time, and no detraction was sought to be made for non-fulfilment of the contract: that defendants by parol waived and discharged the plaintiff from the performance of the alleged covenant, and on completion of the work promised to pay the plaintiff notwithstanding anything in the said indenture to the contrary contained; and that upon the faith of said promise the plaintiff delivered possession of the premises to defendants, who accepted the same.

Fifth Replication, on equitable grounds: That after the breach in the plea alleged, the defendants, for good and sufficient consideration, by parol, discharged the plaintiff from the performance of the covenant and damages for the breach thereof.

Held, on demurrer: 1. Fourth replication bad, for it disclosed no equity, and was multifarious, inconsistent, and embarrassing: that the architects could only certify subject to defendants' right of deduction: that the omission to complain was immaterial: that the parol waiver after breach and without consideration, could not avail: that the promise to pay as alleged, might mean subject to the deduction: and that the delivering possession to the plaintiffs of their own building, as stated, could form no satisfaction.

2. That the fifth replication was good.

It is not necessary in equitable pleadings at law, to follow the rules of equity pleading, and it is unnecessary therefore in such a pleading, to aver the nature of the consideration relied on.—*Lewis v. Manning*, 2 U. C. L. J., N. S., 247 followed.

DECLARATION on the common counts, for work and labor, &c., on a building erected by plaintiff for defendants. The plaintiff claimed \$700.

Sixth plea : That by an indenture bearing date the 31st of July, 1871, the plaintiff covenanted to finish and complete the said works on or before the 31st of October, 1871, under a forfeiture from the plaintiff to the defendants of the sum of \$20, as liquidated damages, for every week the works should remain unfinished after the said 31st of October ; and the plaintiff did not complete the said work as aforesaid on or before the said 31st of October, nor for a long time afterwards, to wit, for twenty weeks afterwards, which period elapsed before this suit, and thereby divers sums of \$20, amounting to \$400, at the commencement of this suit, became and were, and still are due from the plaintiff to the defendants as such liquidated damages under the said agreement, and which last mentioned sum the defendants are ready and willing to set off as against \$400, parcel of the said sum of \$700.

Fourth replication, on equitable grounds : That in and by the alleged indenture it was provided that the works should be done to the satisfaction of Messieurs Smith and Gemmell, the architects in the indenture named : that in and by said indenture it was further provided that if any dispute or misunderstanding should arise by or between the parties thereto, touching or concerning the works, or any part thereof, contracted to be done by the plaintiff, or as to the true intent and meaning of the said alleged indenture, and of plans and specifications to which reference is therein made, the same should be referred to Messieurs S. and G., the said architects, for adjudication, and whose award should be final : that in and by said indenture, defendants agreed with the plaintiff to pay him the sum of \$3,037, on the said architects' certificate from time to time, in manner following : namely, 80 p. c. on the amount of the work done and materials delivered on the premises in the indenture described, to be applied to the erection of the building therein also described, being the work, labour, and materials, for which plaintiff sues in this action, and the balance one month after the whole had been certified to be completed by the said architects, subject however to

any detraction for the non-fulfilment of the terms of said indenture or any part thereof. And the plaintiff avers that he entered upon the doing of the said works, and completed the same to the satisfaction of the architects: that no objection was made, either by the architects or the defendants, that the works were not being done with sufficient speed or completed in proper time: that the architects from time to time certified as in the indenture provided, and on the completion of the works certified that the whole had been completed by the plaintiff, and he was entitled to be paid for the same: that more than one month elapsed after this certificate, before action: that no complaint was made by defendants, either before the said last mentioned certificate, or at any time before suit, that the work had not been completed in proper time, and no detraction was made or sought to be made for any alleged non-fulfilment of the terms of the indenture: that defendants by parol waived and discharged the plaintiff from the performance of the alleged covenant, and upon the completion of the said work promised the plaintiff to pay for the same, notwithstanding anything in the said alleged indenture to the contrary contained: that upon the faith of the said promise the plaintiff, before action, delivered possession of the works to the defendants, who before action accepted the same;—wherefore the plaintiff says that the defendants ought not in equity to be allowed to set up the matter in the plea contained as a set-off to the sum of \$400, parcel, &c.

Fifth replication, on equitable grounds, to the same plea: That after the breach in the plea alleged, defendants for good and sufficient consideration, by parol, exonerated and discharged the plaintiff from the performance of the covenant in the plea alleged, and of and from all damages occasioned by the breach thereof.

Demurrers to both replications, on the grounds as to the fourth replication:—

1. That it is no answer to the plea.
2. That it is not alleged that it was agreed to refer to

the said architects the question whether or not the plaintiff should have performed his covenant in the plea mentioned, or whether any amount should be paid by the plaintiff to the defendants for the non-fulfilment thereof; but, on the contrary, it is alleged that the balance of the money to be paid by the defendants to the plaintiff should be paid within one month after the works should have been certified to be completed by the architects, subject however to any deduction for the non-fulfilment of the terms of the said covenant.

3. That the defendants were not, nor were the architects, bound to raise any objection before action, that the plaintiff had not fulfilled his contract.

4. That after breach the plaintiff could not be relieved from liability otherwise than by release under seal, or by accord and satisfaction, legal or equitable.

5. No consideration is alleged for the alleged promise to pay for the work notwithstanding anything in the said indenture.

As to the fourth and fifth replications, on the grounds:—

1. A parol waiver in discharge is no answer in equity, any more than in law, to a breach of covenant, in the absence of fraud or valuable consideration.

2. The allegations in said replication constitute no sufficient answer in equity, any more than in law, to the said plea.

Joinder.

During this term the demurrers were argued.

MacLennan, Q. C., for the defendants. The plaintiff had to get the certificate from the architects before the defendants could make their deduction from it. The certificate cannot, therefore, conclude the defendants from making their deduction.

The fourth replication is bad, for setting up a parol waiver of the deed, and also because it alleges a promise of the defendants on the completion of the building to pay the same notwithstanding anything in the indenture con-

tained, and no consideration is shewn: *Yeomans v. Williams*, L. R. 1 Eq. 184; *Cross v. Sprigg*, 6 Hare 552; *The Thames Iron Works and Ship Building Co. v. The Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358; *McGiverin et al. v. Turnbull*, 32 U. C. R. 416.

The fifth replication is bad, because it does not shew what the considerations were for the discharge. The release should have been shewn to have been one which would have been good in equity. The consideration should have been specifically stated, for it may be that what the plaintiff calls "good and sufficient considerations," would, if described, appear to be no consideration at all. The Court should be enabled to judge of the sufficiency of the consideration; *Lewis's Equity Drafting*, 17, 22, 23, 33, 34, 44, 55, 82, 118, 123, 182, 183; *Gilbert v. Lewis*, 11 W. R. 223. [RICHARDS, C. J.—As to matters of form in equitable pleading, we must be governed by rules of law, as to matters of substantial defence, by the principles of equity.] The mere allegation of fraud is not a sufficient statement of it in equity pleading. The facts constituting the fraud, must be set out, in order that the Court may be enabled to determine the facts of fraud or no fraud. *Hardman v. Ellames*, 2 M. & K. 732, shews that a general statement of adverse possession is not sufficient, but the particular facts constituting the adverse possession must be specified.

Harrison, Q. C., contra. The plea is bad, for it professes to answer the whole declaration, and it answers only a part of it. (It was agreed that this objection should be amended.)

The case of *Thames Iron Works and Ship Building Co. v. The Royal Mail Steam Packet Co.*, 13 C. B. N. S. 358, does not apply here, because the plaintiff by alleging the parol waiver of the deed in his replication, does so to avoid the effect of the plea, and to maintain his own declaration.

The fifth replication is a good equitable discharge: *De Pothonier v. De Mattos*, 1 E. B. & E. 461. It is not necessary at law to plead the consideration more particularly,

and the language of pleading at law is not altered because an equitable answer is set up: *Lewis et al v. Manning*, 2 L. J. U. C. N. S. 247.

As to the fourth replication: the defendants cannot deduct, as the architects have given their final certificate entitling the plaintiff to call for payment of the whole amount of it. They would not and could not have given it if they had considered the defendants had the right to deduct for the alleged delay: *Arnold v. Walker*, 1 F. & F. 671; *Goodyear et al. v. Mayor, Aldermen, and Burgesses of the Borough of Weymouth and Melcombe Regis*, 35 L. J. C. P. 12. The facts relied upon—that the defendants waived the breach: that they promised the plaintiff to pay him for his work; and that they gained a benefit by the giving up of the building by the plaintiff, which was a special consideration of itself sufficient to support a promise—all shew a sufficient equitable answer against the legal set-off of the penalties claimed by the defendants. He referred to *Roberts v. The Bury Improvement Commissioners*, L. R. 5 C. P. 310, 326; *Stadhard v. Lee*, 3 B. & S. 364; *Kirk v. Bromly Union*, 16 L. J. Ch. 114, S. C. 17 L. J. Ch. 127; *Woodfall*, L. & T. 10th Ed. 317, 318, 352; *Carpenter v. Blandford*, 8 B. & C. 575, 577, *Ranger v. The Great Western Railway Co.*, 5 H. L. Cas. 72; *Thornhill et al. v. Neats*, 8 C. B. N. S. 831; *Lampkin v. The Ontario Marine and Fire Insurance Co.*, 12 U. C. R. 578.

MacLennan, Q.C., in reply. The deduction is not a penalty. It is a clear demand for so much money. The architects had no power to say whether the defendants should or should not claim the weekly stipulated sum. Nor could they by any certificate order the defendants to pay it.

WILSON, J., delivered the judgment of the Court.

The fifth replication is sufficient according to the case of *De Pothonier v. De Mattos*, 1 E. B. & E. 461, which we have followed in *McGiverin et al v. Turnbull*, 32 U. C. R. 407.

It was contended by Mr. MacLennan that the precise

nature and extent of the consideration should have been shewn in the replication, in order that the court might judge whether the consideration was good and sufficient as alleged. And he referred to the Chancery mode of pleading such a matter, which he contended should be followed here, because this was an equitable pleading.

A release at law of all demands, or of real or personal rights, I presume, has always been valid without any consideration. The deed imports a sufficient consideration—the will and deliberation of the party. And for that reason it is said to “bind without regard to the consideration:” *Sharington v. Strotton*, *Plowd.* 308 *b*; *Pillans et al. v. Van Mierop et al.*, 3 Burr. 1670–1671.

This rule applies to all deeds which operate by transmutation of possession: *Shep. Touch.* 510. In deeds which do not, such as in bargain and sale, and in covenant to stand seized, there must be a consideration to raise the use: *Ibid.* It is not necessary the consideration should be mentioned in the deed, as it may be averred: *Ibid*—See also 1 *Bythewood's Conveyancing*. 3rd ed., 327, which gives all the authorities on this subject.

As this discharge is not one operating by the common law, it was necessary it should be founded on good consideration. That consideration is sufficiently shewn in pleading by the allegation that it was a good and sufficient consideration. The proof of it will, of course, have to be that there was such a consideration as that which has been alleged.

It was argued, that the particulars of a fraud must always be set out in the pleadings in equity, and so the rule should be followed at law when equitable pleadings are used.

In *Gilbert v. Lewis*, 9 Jur. N. S. 187, it was said, that fraud was a conclusion of law, and therefore the facts which were relied upon as constituting it should be set out.

The rule has obtained at law since *Tresham's* case, 9 Co. 110, that fraud may be alleged generally in a plea

or replication, for it usually consists of a multiplicity of circumstances, and it might be inconvenient to require them to be stated with particularity : *Chitty* on Pleading, 7th ed., vol. I. p. 563. The like form is in use at the present time by the latest precedents.

In a declaration charging a liability by reason of the fraud of the defendant, the act of fraud is always stated, as by fraudulently warranting a horse to be sound, and thereby inducing the plaintiff to buy it ; or by falsely representing goods to correspond with certain samples, and the like, in the numerous other cases which may be referred to under that head ; just as it was said should be done in equity in the case of *Gilbert v. Lewis*, 9 Jur. N. S. 187, which was referred to. The party may plead the particulars of fraud if he please, as in *Tuck v. Tooke, et al*, 9 B. & C. 437.

A defendant will not be allowed to plead a general plea of fraud, and a special plea averring the particulars of the fraud : *Reid v. Rew*, 6 Jur. 999.

To a bill filed for the recovery of land, the defendant pleaded that the possession had been adverse to the plaintiff and to those under whom he claimed, for upwards of sixty years. It was held the plea was too general, and might consist in various things : *Hardman v. Ellames*, 2 M. & K. 732. That case is certainly opposed to the old plea of the general issue, or *liberum tenementum* at law, and to the modern plea of not possessed, and in ejectment to the denial of the plaintiff's title, and to the more special defence that the defendant claims by length of possession, under which the title to all disputed lands has been tried for centuries.

It is not disputed that in pleading a release in equity, the consideration on which it is founded, must be stated : *Willis* on Pleading, 556, gives the old form, and refers to *Lord Redesdale's* Treatise, 212, 213 ; and the late works on the subject state the rule still to exist. Nor was it disputed that such is not the rule at law.

We do not accede to the argument that we are to adopt the equity rules in framing pleas and subsequent pleadings

whenever an equitable defence or later equitable answer is put in.

The mode of setting out the necessary facts, or pleading, for adjudication, is a mere matter of procedure adapted to the requirements of the different Courts. It would be useless to enter into this question more minutely, to shew that it would be very inexpedient to do so, even if it could be done. The case of *Lewis v. Manning*, 2 L. J. U. C. N. S. 247, before Draper, C. J., to which we were referred, is an authority on this point.

We hold the fifth replication to be sufficient.

As to the fourth replication. It is a long, multifarious story, and an attempt to construe into an equity a number of disconnected facts, when not one of them has a semblance of equity about it.

The architects were bound to give to the plaintiff the final certificate. They could give it only subject to any proper deduction which the defendants might have to make from it.

That the plaintiff completed the work to the satisfaction of the architects may be quite true, as to the quality and character of the work; but they could not, however satisfied they were, even as to the time in which it was done, which is not in any form alleged, discharge the plaintiff from his liability per week for the delay.

The fact that the architects and the defendants made no objection to the speed with which the work was done or completed, is of no kind of moment. They were not obliged to complain. The defendants may in fact not have objected, and that is the presumption, just because they had a full counter-claim against the plaintiff.

The case of *Carpenter v. Blandford*, 8 B. & C. 575, is the nearest in the plaintiff's favor, but it does not apply here, as the facts are so different.

The architects may have certified the plaintiff was to be paid, but that can only mean, subject to the defendants' rights. If the plaintiff mean more than that, he should have alleged it, but he has not done so.

That the defendants made no complaint after the giving of the last certificate, and before the commencement of the action, that the works had not been done in proper time, is utterly idle. They were not required by the contract, or by any rule of law or equity, to do so; and it is not shewn they had an opportunity of doing so.

That no deduction was made, or was sought to be made, is a matter of the same useless nature. It is not shewn they had any chance of doing so. It was time enough to do it when they were called upon to pay: and it is not shewn they were ever called upon to pay before the commencement of the suit.

So far, the series of acts which form an equity consist of a number of negative acts, which in no way affected or misled the plaintiff, and which could not by possibility have done so.

Their rights are not to be thus taken away from them, which they had by deed, when they did nothing to impair or to part with them, and were never asked or required to do so, and never had the opportunity given to them of saying whether they continued to rely upon or to abandon them.

But the replication now comes to some acts of an affirmative character:

Firstly, that the defendants by parol waived and discharged the plaintiff from the performance of his covenant.

Secondly, that on the completion of the work the defendants promised to pay the plaintiff, notwithstanding anything in the indenture to the contrary contained.

And, thirdly, that upon the faith of the said promise the plaintiff, before action, delivered up possession of the said works to the defendants, who accepted the same.

As to the parol waiver and discharge, it is not shewn whether it was before or after breach of the covenant. It is not shewn what particular part of the plaintiff's engagement he was discharged from. It is said, generally, the waiver and discharge were from the performance of the alleged covenant. But the plaintiff has himself relied

upon the covenant in his replication throughout. Every word of his answer to the plea, is that the certificates were given and the work was done under the indenture, and now he says that the defendants waived and discharged him from its performance.

It is a multifarious and objectionable mode of pleading, to begin with, which would have been corrected as embarrassing, if an application had been made for the purpose. It is as inconsistent as it is possible to be, both asserting and denying the validity of the covenant.

But if it can have any meaning at all, it must be, that after the work was done and the final certificate was given, the defendants waived and discharged him from the performance of the covenant, that is, that the waiver and discharge were after breach.

Such a waiver, without deed, and without consideration, is a good defence to actions on bills and notes, by the law merchant: *Foster v. Dawber*, 6 Ex. 851. But it is not so at law in other cases, for then it must be settled by accord and satisfaction, or by a release: *Edwards v. Chapman*, 1 M. & W. 231; *Goldham v. Edwards*, 17 C. B. 141.

In equity it is not shewn to be a good defence, without any consideration whatever. *Cross v. Sprigg*, 6 Hare 552, is to the contrary.

The plaintiff probably means, that the defendants after breach of the covenant discharged the plaintiff from the payment of the weekly demand for his delay in completing the works. He has shewn no authority to lead us to the conclusion that such a parol bargain would be an operative discharge in equity.

The contrary seems to be the case from the argument on the fifth replication, where it appears the consideration for the release must be shewn in equity.

As to the promise by the defendants, on the completion of the building, to pay the plaintiff, "notwithstanding anything in the indenture to the contrary contained," it is subject to the same vicious infirmity of all the other allegations in this replication, that it gives us no specific details, but deals in the vaguest generalities.

If, by this allegation is meant that the defendants would pay the plaintiff's final certificate without making any deduction for or in respect of the several weekly sums in question, why is it not so stated? As it stands, the promise is neither good nor bad, because the defendants were bound to pay the plaintiff, notwithstanding anything contained in the indenture, and the mode in which they do pay him is by claiming their deduction.

If the promise had been, that the plaintiff would pay the defendants notwithstanding anything contained in the indenture, could that be construed to mean, that the plaintiff would pay them these weekly demands without claiming anything against them for the work he had done for them? We think not. No more then can it be made to mean that, when the situation of the parties is reversed.

Then the last ground is, that this demand of the defendants should not be made, because upon the faith of this promise the plaintiff, before action, delivered up to the defendants the possession of their own building, and they accepted the same.

This is perhaps intended as an accord and satisfaction, in addition to the other three distinct defences contained in this replication.

But an accord, that the plaintiff, in an action for forcible entry, should re-enter and have his charters re-delivered by the defendant, is not good; for the re-delivery to the plaintiff of his own charters is not a satisfaction for the precedent tortious entry. Nor in trespass for taking cattle, is it an accord, that the plaintiff should have his cattle again. Nor in covenant for not repairing, that the defendant should do the repairs: *Com. Dig.* "Accord" B. 1.

There is nothing which shews that the giving up of the house could operate in any manner in the plaintiff's favor; and it is for the party pleading such a matter to shew that the subject of it could be, or might be a good and sufficient satisfaction. That the plaintiff has not done; for the presumption is, that the defendants were entitled to the possession, and that the plaintiff was a mere wrongdoer

in keeping the possession from them ; or that he was doing no more than he was bound to do in giving it up to them, unless the contrary be shewn.

The judgment will be for the plaintiff on the demurrer to the fifth replication, and for the defendants on the demurrer to the fourth replication.

Judgment accordingly.

REESOR V. PROVINCIAL INSURANCE COMPANY.

Insurance by mortgagee—Right of insurers to an assignment of the mortgage—Pleading.

Declaration upon a fire insurance policy for \$1000, upon a brick house.

Second plea, on equitable grounds: that by the policy whenever the defendants should pay any loss to the insured, he agreed to assign over all his right to recover satisfaction therefor from any other person, town, or other corporation, or to prosecute therefor at the charge and for the account of defendants, if requested: that the plaintiff was the mortgagee of the said premises insured, and that although the defendants have always been ready, and have offered to pay the plaintiff the insurance and premium, upon the plaintiff assigning the said mortgage, and although the defendants have tendered an assignment, the plaintiff refused to assign.

Equitable replication: that the mortgage contained a provision requiring the mortgagor to insure the premises, and that the plaintiff under the instructions of the mortgagor, and at his costs and charges, and as his agent, insured the said buildings.

Rejoinder, on equitable grounds: that by one of the conditions of the policy, if any person insuring made any misrepresentation or concealment, such insurance should be void, and that at the time of insurance the plaintiff concealed from the defendants that he insured under the instructions and for the benefit of the mortgagor, whereby, &c.

Held, on demurrer, plea bad: for if it was intended to rely upon the condition, the mortgage security would give the plaintiff no right to recover from the mortgagor for the loss insured against, but only to recover his debt; and if it was intended to set up, apart from the condition, that because the plaintiff was mortgagee the defendants, on paying his mortgage debt, were entitled to the assignment, then enough was not shewn to entitle defendants in equity to a perpetual and unconditional injunction.

Per *Wilson, J.*, the plea was also bad, 1. Because, the alleged agreement being that whenever the defendants should pay any loss the plaintiff would assign the mortgage, or prosecute for satisfaction if requested by defendants, the defendants were bound first to pay; and 2. Because it was not shewn that the insurance money was as large or larger than the amount of the mortgage.

Semble, per *Wilson, J.*, that defendants had not the right under such agreement to elect whether the plaintiff should assign or prosecute:

Held, also, that the replication shewed a good answer to the plea.

Held, also, rejoinder bad, for departure, and because the plaintiff having stated that he was mortgagee, was not bound, unasked, to disclose that he was insuring for the mortgagor, and the concealment was of an immaterial matter.

Quære, whether when a mortgagee insures property mortgaged to him, the Insurance Company can, in case of loss, compel him to assign to them the mortgage.

DEMURRER.

Declaration on a policy of insurance against fire on a brick house and out-houses in the village of Markham, for \$1000, dated 4th of April, 1872.

Second plea, on equitable grounds: that in and by the said policy it is provided and agreed, that whenever the defendants should pay any loss the assured, the plaintiff, agreed to assign over all his right to recover satisfaction therefor from any other person or persons, town or corporation, or to prosecute therefor at the charge and for the account of the defendants, if requested. And the defendants say that the plaintiff was at the time of the alleged loss the mortgagee of the said insured property, and of the land whereon the same stood at the time of the alleged loss and is still such mortgagee of said lands; and although the defendants have always been ready and offered and tendered to pay the plaintiff the amount of said insurance, with the premium for effecting the same, upon the plaintiff assigning the said mortgage to the defendants, and although the defendants at the same time tendered an assignment to the plaintiff for execution to them of the said mortgage, upon the said payment by the defendants to the plaintiff, yet the plaintiff wholly neglected and refused so to assign the said mortgage to the defendants, and still refuses so to do.

Equitable replication: that when the plaintiff became the mortgagee of the said lands and premises in the said plea mentioned, the mortgagor in said mortgage covenanted with the said mortgagee that he, the said mortgagor, would insure the said buildings on said land; and that the plaintiff, under the instructions of the said mortgagor, and at the costs and charges of the said mortgagor, and for the

benefit of the said mortgagor, and as the agent of the said mortgagor, insured the buildings on the said lands, on the 3rd day of April, 1872, for the sum of \$1000, for which defendants then gave their policy of insurance to the plaintiff, and the buildings and premises insured by said policy of insurance were consumed by fire during the currency of the said policy.

The plaintiff also demurred to the plea, on the grounds :

1. The said plea does not shew that the claim sued upon is the same or equal to the amount of the mortgage therein referred to, or any right to have a mortgage on land assigned.

2. The said plea does not connect the said mortgage with the plaintiff's claim, or shew that they are the same transaction, or that the plaintiff has any right against any other person to recover satisfaction for the said loss.

3. The said plea does not shew that the assignment of said mortgage by the plaintiff was a condition precedent to the payment of plaintiff's claim, and therefore the non-assignment is no excuse for non-payment.

Rejoinder, on equitable grounds : that by one of the conditions endorsed on the said policy it is declared, " If any person insuring any buildings or goods with the defendants shall make any misrepresentation or concealment, such insurance shall be void and of no effect." And the defendants say that at the time of the insurance by the defendants for the plaintiff of the said buildings the plaintiff represented in writing to the defendants that he was the mortgagee of the said property as in the said plea mentioned, and concealed from the defendants that the plaintiff insured the said buildings under the instructions and for the benefit of the mortgagor, and as the agent of the mortgagor, whereby the said insurance became void.

Demurrer to the rejoinder, on the grounds :

1. That it is a departure, and sets up new matter not in answer to the said replication, but is in fact a new plea sought to be pleaded by way of rejoinder.

During Michaelmas Term last the demurrers were argued.

McMichael, Q. C., for the plaintiff. The plea is bad, because it does not shew that the mortgage, of which an assignment is claimed, is for the same amount as or less than the insurance money which the plaintiff sues for. For all that appears the mortgage may be for a larger amount, and the defendants could have no claim as to the excess; so that granting that the preliminary steps were rightly taken by the defendants, the plaintiff may have been justified in refusing the assignment. The plea is also deficient in not connecting the plaintiff's claim in this suit with the mortgage. The mortgage is not such a claim as the condition referred to in the plea intends that the plaintiff shall assign over to or prosecute for the benefit of the Company. There is nothing to shew that the assignment was a condition precedent to the payment of defendants. The rejoinder is bad as a departure: *Scholefield v. Lockwood*, 9 Jur. N. S. 738, 740; *Richards v. Liverpool and London Fire and Life*, 25 U. C. R. 400. It should have been added as a plea if relied on as a defence. The concealment or non-disclosure of the fact that the plaintiff insured for the mortgagor was immaterial. The plaintiff was not bound to tell whom he insured for, and he was not asked. He also referred to *Fisher on Mortgages*, 2nd ed. Vol. II. 890, 891; *Burton v. The Gore District Mutual Fire Insurance Co.*, 12 Grant 156; *Dobson v. Land*, 8 Hare 218.

J. H. Cameron, Q. C., and *Duggan*, Q. C., contra. The Company are entitled to an assignment irrespective of the amount claimed. The parties stand in the same position in Equity as principal and surety. The Court will not assume that the mortgage is for a larger amount than the policy, and that is what the plaintiff asks.—[WILSON, J. You should have averred that the mortgage was for the same, or a less sum.]—We contend they should shew how that is. We shew a tender of the money.—[WILSON, J. You only shew you have offered and tendered to pay.]—That is suffi-

cient. On the cases as to indemnity the plea is good: *White v. Dobinson*, 14 Sim. 273.—[RICHARDS, C. J. That case does not apply. Neither does the principle of indemnity. The whole undertaking of the Company is, that they will insure the building; they pay no debt.]—The mortgagor has nothing to do with the money; he can claim no account of it, and the plaintiff need never pay the amount received in this suit upon the mortgage debt, so that unless the plaintiff is made to assign over the mortgage, his insurance is a mere gambling transaction. As to subrogation, see *Rex v. Insurance Co.*, 2 Phila. Rep. Pa. 357, cited in Clarke's Insurance Digest, 2nd ed. p. 210; *Mathewson v. Western Assurance Co.*, 10 Lower Canada 8; *Philips on Ins.*, 5th ed. vol. II., 240. As to departure in the rejoinder; there is no departure in Equity, and looking at the whole pleadings, the plaintiff ought not to be allowed any benefit from that objection. It was within the plaintiff's knowledge that he insured for the mortgagor, and when the defendants became aware of it through the replication, they were entitled to take advantage of it. If the plaintiff is entitled to anything under and by reason of the facts disclosed in the replication, then the concealment of those facts was material. The following authorities were referred to: *Clarke's Digest of Insurance Cases*, 2nd ed., p. 563, 566; *Kernochan v. New York Bowery Fire Insurance Co.*, 17 N. Y. 428; *Suffolk Insurance Co. v. Boyden*, 9 Allen (Mass.) 123; *King v. State Mutual Fire Insurance Co.*, 7 Cush. (Mass.) 1; *Carpenter v. Providence Washington Insurance Co.*, 16 Peters, 495; *Tyler v. Aetna Insurance Co.*, 12 Wend. 507; *Robert v. Trades Insurance Co.*, 17 Wend. 631; *Humphrey v. Arabin*, Lloyd & Gould's cases, Temp. Plunkett, 318; *Dalby v. India and London Life Assurance Co.*, 15 C. B. 365; *Mason v. Sainsbury et al.*, 3 Doug. 61; *Clark v. The Inhabitants of the Hundred of Blything*, 2 B. & C. 254; *Quebec Assurance Co. v. St. Louis et al.*, 7 Moore P. C. 286.

RICHARDS, C. J.—If the reference in the second plea to the condition is intended to make that the formal part of

the plea, so as to shew it was under the condition the duty of the assured to assign his mortgage security to the defendants on their paying the loss, I think the plea bad, simply because his mortgage security gives him no right to recover for the loss assured against from the mortgagor. His mortgage may give him the right to recover his debt, but certainly not the value of the building insured, which is the loss defendants agree to pay to the plaintiff, if the building was destroyed, if the amount insured did not exceed that value.

No doubt, if the fire was caused by the negligence of the servants of a railway, the defendants might ask to have the claim to recover for the loss against the railway or even their servants, assigned to them. And where the town or other corporation might be liable for the loss, in the event of a riot, or for any other cause, then the defendants might in a similar way claim to be put in the place of the plaintiff to recover therefor.

I do not think the right to recover satisfaction *therefor*, (meaning the loss set forth in the condition), as set forth in the second plea, means the mortgage debt, but the value of the property insured.

If, however, it is contended that, rejecting the reference to the condition, the defendants set up, that, by reason of the fact that the plaintiff is a mortgagee, that the defendants paying him his mortgage debt and the premium of insurance are entitled to the assignment of it, because of the rule in Equity, that the person who pays the debt is entitled to the securities held by the creditor, it seems to me that the plea is bad, because it does not shew a state of facts in which a Court of Equity would grant a perpetual, unqualified, and unconditional injunction.

I fail to see anything in the plea which would make the assignment of the mortgage securities a condition precedent to the payment of the loss.

If it is pleaded as a plea of tender, the money does not appear to have been paid into Court.

Without expressing an opinion whether an insurance

company, who are paid by a mortgagee to insure certain buildings mortgaged to him, can, in case of loss, compel him to assign his security to them, it is sufficient for the purposes of this pleading to hold that plea is not pleaded here in such a way as to bar the plaintiff's right to recover.

We have not been referred to a single case where it has been decided in England, on a loss arising from the destruction of buildings mortgaged, insured by the mortgagee, that an insurance company can claim to have the mortgagee's security for his debt assigned to them.

There is a case in our own Court of Equity, *Burton v. Gore District Mutual Fire Insurance Co.*, 12 Gr. 156, where the mortgagee was compelled to assign the mortgage security to the Company, on being paid the amount of their debt; but in that case the mortgagor had precluded himself from recovering on the policy, if the insurance had stood in his own name.

The American cases to which we have been referred on the point are not uniform, and some of them raise serious doubts, that the doctrine of subrogation has been carried to the extent contended for by the defendants here. Some of the ablest judgments on the subject, are rather against them.

The authorities are reviewed in *Hare & Wallace's American Leading Cases*, 5th ed., vol. ii., 825, in the notes in *Lazarus v. Commonwealth Insurance Co.*

Suffolk Insurance Co. v. Boyden, 9 Allen (Mass.) Reports 123, and *King v. State Mutual Insurance Co.*, 7 Cushing (Mass.) 1, are strong cases for the plaintiff.

The replication seems to displace the plea, if it is good; and the rejoinder seems to be a departure, even if a notice were necessary under the condition referred to in the rejoinder.

Departure is still a ground for general demurrer; and the rejoinder is bad, that ground having been taken.

We fail to see how the ground stated in the rejoinder can be any answer to the replication. The misrepresentation or concealment, to make a policy void, must be of

some fact material to be known and correctly known to the assurers; and before the insured can be subjected to a forfeiture of his policy, it ought to be shewn that the matter, of which the defendant omitted to give notice was such as he was informed, or ought to have known, it was necessary to be disclosed to the defendants. The plaintiff represented to the defendants that he was the mortgagee of the premises; if the defendants desired to know the terms of the mortgage they could have enquired, or made it a condition of the policy that the terms should be given.

We have been referred to American cases as applicable to these provisions of insurance policies. Most of the cases I have seen decide that it is not necessary to give the Company notice that the assurance is made on behalf of the mortgagor. See *Clarke's Digest of Decisions in Insurance Cases*, 566, 567; *Kernochan v. New York Bowery Insurance Co.*, 17 N. Y. St. R. 428.

On principle I fail to see how any notice should be necessary. *Primâ facie* the assured is entitled to recover the amount which the Company by their policy agree to pay, if the assured proves the property destroyed is worth the amount insured. If he is a mortgagee, and his mortgage debt unpaid amounts to the sum assured, his right of action seems complete.

The argument is, that he is not *bound* to apply this money to the payment of the mortgage debt, and it would, if he was allowed to retain it, be a gambling contract forbidden by the statute; therefore the Insurance Company, on paying the debt and premium, has a right to claim an assignment of the mortgage debt.

But here the insurance was made for the benefit of the mortgagor, at his cost and charges, and therefore the only ground on which the Company could claim the transfer of the securities is taken away, and if the transfer were made the Company could have no greater rights than the mortgagee, and he having effected the insurance for the mortgagor, and received the assurance money, could not recover that amount over again from the mortgagor.

The replication shews, that by the terms of the mortgage, the mortgagor was to insure the buildings on the land for the security of the mortgagee. If the defendants desired to know the terms of the mortgage they could state in so many words, in their conditions of assurance, that when property was insured in the name of a mortgagee, the terms of and amount to be secured by mortgage must be mentioned. In the absence of such conditions I see no reason why the mortgagee should inform the Company of the fact that he was insuring at the request and for the mortgagor, as he, the mortgagor, was bound to insure according to the terms of the mortgage, any more than he was bound to inform the Company of the amount of the mortgage money.

In the exhaustive judgment of Sir James Macaulay, in *Ogden v. Montreal Assurance Co.*, 3 C. P. 516, authorities are quoted to shew that a mortgagee may insure for the full value of goods in his own name, and if he insure in his own name for the benefit of both himself and the mortgagor, the fact may be proved by parol.

We think the judgment should be for the plaintiff on the demurrers.

MORRISON, J.—I am also of opinion that the plaintiff is entitled to our judgment on the demurrers. I express no opinion as to the right of the defendants to an assignment of the mortgage.

WILSON, J.—The rejoinder is a departure from the defence set up in the plea.

The defendants may say, they did not know of the facts which are contained in the replication until it was pleaded, but that is no reason why a new defence should be set up at a later stage of the pleadings. The defendants might have got leave, if they had applied, to be let in to add the matter of their rejoinder as a plea.

If the declaration or plea had shewn there was such a condition as that which is contained in the rejoinder, although no issue had been raised upon it, the rejoinder, as

it is, might perhaps have been pleaded, or the defendants might have demurred to the replication, if they thought the matter of the replication so opposed to the condition set out in the previous pleadings as to avoid the policy.

But that is not the case here. A wholly new defence is set up in the rejoinder from that which was set up in the plea; and if that were to be allowed, a still different defence from these two might be pleaded in the rebutter.

There is no reason we see why the matter of the rejoinder should not have been pleaded as a plea. And the objection to a departure is, that it occasions a retardation of the issue, which may indefinitely postpone an ultimate issue and trial of it.

If there were no departure, we should hold the rejoinder bad on the merits. It discloses no concealment by the plaintiff. That the plaintiff was mortgagee at the time of the insurance, was known to the defendants. And although he did agree to assign to the defendants his right to recover satisfaction for the moneys they paid to him from any other person, or to prosecute therefor at the charge and for the account of the defendants, if requested, he did not engage with them, that he was insuring at his own expense and risk, so that he could not compel the mortgagor to repay him the premium he was paying to them.

It is not usual for the mortgagee to insure at his own expense, if he can avoid it. He usually does so at the expense, and of course with the consent, of the mortgagor.

And, if the defendants did not ask the mortgagee at the time of the insurance the terms upon which he was insuring, it was their own fault; he was not bound to tell them, if they did not see fit to ask him.

They may have assumed he was insuring for himself, and, as he was mortgagee, that they would get the benefit of his mortgage; but if they chose to rest contented on that assumption, he was guilty of no concealment.

The plaintiff is entitled to judgment on demurrer against the rejoinder.

The plea relies upon the non-assignment by the plaintiff

to the defendants of the mortgage, as a defence against their liability to pay the insurance money.

The agreement is said to have been, "that whenever the defendants should pay any loss, the plaintiff agreed to sign over all his right," &c. The defendants have not paid, and will not pay until the plaintiff does assign. Are they justified in that, or should they first pay?

I think they must first pay. When they *should* pay, the plaintiff is to assign. But an assignment may not be required. The defendants may require the plaintiff to prosecute for their benefit, and it cannot be that the plaintiff is to do that before he is himself paid: *King v. State Mutual Fire Insurance Co.*, 7 Cush. (Mass.) R. 1.

The case of *Scott v. Parker*, 1 Q. B. 809, shews, that on a loan of money by deposit of securities, to be given up upon payment, the delivery up of the securities was not a condition precedent, or concurrent with the payment of the money.

It may be assumed that the plaintiff insured as mortgagee of the premises, and in respect of the mortgage of which the defendants claim an assignment. And it is very obvious, that on the facts disclosed by the plea the plaintiff, although paid by the defendants, has a remedy over against his mortgagor.

But I think the defendants have no right to claim an absolute assignment of the whole mortgage, if that mortgage is for a greater sum than the defendants are liable to pay, or if it is for the performance of acts of which the defendants could gain no advantage, as to build a house on the mortgagee's premises.

And they have not shewn that their liability to the plaintiff is more than, or as much as, the claim which the plaintiff is entitled to recover from the mortgagor.

The plea, as I read it, is that the plaintiff will assign, or prosecute for satisfaction, if requested by the defendants.

The latter words, "if requested," &c., apply, I think, to both acts, to the assigning as well as to the prosecuting.

The defendants have requested the plaintiff to assign.

Have they the election, or has the plaintiff? If they have, their plea is right in that respect. If they have not, their plea is defective.

The general rule is, that he who has to do the first act is the one who may elect which of the two acts he will do. Here the plaintiff has to assign, or to prosecute. If that had been all, the plaintiff would have had the election. Does the addition of the words, "if requested," by the defendants, give them the right to request whichever act they may please? I rather think it does not: *Bac. Abr. Election B*; *Com. Dig. Election A*.

If it do not, the plea is bad for that reason also. It is not necessary to decide its sufficiency upon this point, as it is not maintainable on other grounds.

If the plea be good in substance—that is, if on payment by the defendants they are entitled to an assignment of the whole mortgage, if the sum they pay be equal to or more than the mortgage debt; or to such an interest in it, if the mortgage debt be the greater, as will protect them against loss, and entitle them to recover from the mortgagor—the replication appears to be a good answer to the plea; for it shews that the policy money is not, in fact, the plaintiff's, but that it is to be applied for the benefit of the mortgagor, so that the defendants could never enforce their assignment of the mortgage against the mortgagor.

And as that replication is in the line of pleadings demurred to, its sufficiency may also be considered.

Whether the plea, in its substance and on the merits, be or be not a good defence, it is not necessary to decide.

I have looked into it with a good deal of care, and there is much to be said in favour of the contention of the defendants, but the authorities and reasoning are by no means all on the one side.

The question can only arise when the mortgagee, of his own motion, and at his own risk and expense, and for his sole benefit, makes the insurance, and when the insurance money is as much as, or greater than, the debt.

If the debt be the greater, the insurers can never claim

more than a right to participate in the debt, to an amount greater than or equal to the insurance money.

I express no opinion on this part of the case.

The only judgment I now give is, that for the insufficiency of the rejoinder and plea, the plaintiff is entitled to judgment on the demurrers.

Judgment for plaintiff on demurrer.

MORGAN V. LAILEY.

Trespass to land—Obstructing light—Leave and license—Revocation.

Declaration—First count. Trespass, for breaking and entering plaintiff's close, breaking down plaintiff's wall, carrying away part of the material, and building a house against the wall. Second count, for obstructing an ancient light of the plaintiff's.

Plea: Leave and license; to which, so far as it applied to the second count, the plaintiff replied a revocation of the leave before any of the grievances were committed. It appeared that the plaintiff and defendant owned adjoining shops in a city, and that defendant, wishing to improve his own premises, obtained the plaintiff's leave to build on the partition wall owned by plaintiff. It was understood that defendant should pay for this, but the price was never fixed. Defendant finished his building without any objection being made, but afterwards they disagreed as to the sum to be paid, and the plaintiff brought this action, having first served a notice revoking the license and requiring defendant to remove the building:

Held, as to the first count, that the plaintiff must fail, for the gravamen of the charge was the breaking and entering the close, the rest being merely aggravation, and no trespass was shewn to be done after the leave was revoked.

Held, also, as to the second count, that the evidence proved the plea of leave and license, and that the replication setting up a revocation before the commission of any of the grievances was not proved.

Seemle, that the license having been acted upon, and expense incurred by defendant, it could not be revoked.

DECLARATION,—First count: that defendant broke and entered the plaintiff's close, on King street east in the City of Toronto, known as Miller's drug store, being composed of parts of lots 23 and 24 on the south side of King street, east of the government reserve for public buildings; and a wall of the plaintiff's, then standing upon said close, broke down, and destroyed a part of the said wall, and took and carried away and converted to his own use a great quantity of the materials of the same, and built a house against and

upon said wall, and deprived the plaintiff of said wall, and kept him out of the possession and enjoyment thereof.

Second count. And for that the plaintiff was possessed of the premises in the first count mentioned, and was entitled to have the light and air enter therein through certain windows in the said store or premises, and the defendant prevented and obstructed the light from entering through said windows into the said store or premises, by erecting or building against and breaking up said windows, and wrongfully continued said building erected against said windows, and obstructed said windows, as aforesaid, whereby the said store and premises have been rendered dark and unwholesome and of less value, and the plaintiff has incurred expense in opening other windows to obtain light and air to said premises.

Pleas,—1. Not guilty.

2. That the said close and premises were not the plaintiff's as alleged.

3. That defendant did what was complained of by the plaintiff's leave.

4. To the second count : that the plaintiff was not at the said times when, &c., entitled to have the light and air enter into the said store, in said count mentioned, through the said window in the said count mentioned, as alleged.

The plaintiff joined issue on all the pleas, and replied also to the third plea, so far as the same applied to the second count, that before any of the alleged grievances the plaintiff revoked the alleged leave, whereof the defendant had notice.

Defendant joined issue on that replication.

The case was tried at the Spring Assizes for the City of Toronto, before Hagarty, C. J., C. P.

From the evidence given it appeared that the plaintiff and defendant were the owners of adjoining shops on King street; that defendant was desirous of making some additions and improvements to his premises, and obtained the assent of the plaintiff and his agent to use for the purpose of his improvements the partition wall between them, which was built by the plaintiff, or those under whom he

claimed, and he was to pay for the same half the value of the wall, as the plaintiff understood.

The plaintiff's agent said he agreed that he would only charge value. No sum was mentioned.

Defendant did not build on to plaintiff's wall, but inserted posts into the wall.

The plaintiff's agent said the defendant was to pay the value of the bricks and mortar. If they did not agree, they were then to leave it to two persons. They did not agree. The defendant said the plaintiff's agent and he spoke of the cost. Defendant said \$80 to \$85 would be the worth; plaintiff's agent thought that too low; he said, "Make it \$100." Nothing was settled. Defendant thought that would be the extreme amount. No objection was made during the progress of the work. The defendant said, during the negotiation the plaintiff's agent said he thought the windows were twenty years there, and he, defendant, could not darken them. The defendant thought they had not been there so long. After that the plaintiff's agent, in sending in his claim for what he considered he ought to receive, did not say anything as to any amount being charged for darkening the windows. The claim was for bricks and mortar.

The plaintiff's agent, in one of his letters, offered to take \$150 and close the matter; that offer was made without prejudice, but nothing was said about lights in that. The defendant was only willing to pay \$83. The negotiations continued to September. On the 17th of October the plaintiff himself wrote to defendant that he would accept \$150 rather than have further trouble, but if not accepted he reserved the right to claim the full price previously asked, which amounted to \$176.98.

On the 24th of November the plaintiff caused a formal notice to be served on defendant to remove the buildings erected by him, and supported by the wall of the premises he owned as trustee for Mrs. Miller, describing the premises. He also notified him that he had obstructed the light and air entering through the windows of the premises,

and required him to remove forthwith, such obstructions, so as to allow the light and air to enter the windows as freely as before they were so obstructed by the defendant. He thereby revoked any license that defendant claimed to have been given him to use said wall and block up said windows; and informed him, that unless he forthwith removed the said buildings he, plaintiff, would commence an action against him for trespass.

The learned Chief Justice ruled, that after the notice revoking any leave or license that had been given, the plaintiff might sue for the continuing injury.

It was agreed that the plaintiff should have a verdict for one shilling, with a certificate as to the right, and the defendant had leave to move to enter a nonsuit if any license shewn amounted to a legal bar.

The defendant contended that the alleged agreement to pay amounted to an irrevocable license.

In Easter Term *McMichael*, Q. C., obtained a rule *nisi* to set aside the verdict and enter a nonsuit, pursuant to leave reserved, or for a new trial; on the ground that all the issues should have been found for the defendant: that defendant having with the leave and license and acquiescence of the plaintiff erected buildings on his own land, the plaintiff could not revoke the license granted, and should have failed on that issue; and that after consent and acquiescence by the plaintiff to the erection of the building complained of in this action, he could not now be heard to say that any right had been infringed, and that the verdict on the issue as to leave and license, and denying the plaintiff's right in the declaration, should have been found for the defendant.

The rule was enlarged from time to time to this term, when *Anderson*, Q. C., shewed cause. It will be contended that the replication of revocation is no answer; but that should have been raised by demurrer. The facts clearly shew there was a revocation, and a sufficient one. *Winter v. Brockwell*, 8 East 308, will be relied on. That case followed

Web v. Paternoster, Palmer 71, which is overruled by *Wood v. Leadbitter*, 13 M. & W. 838. See, also, *Gale on Easements*, 4th ed., p. 25, 26. The latest cases are *Stokoe v. Singers*, 8 E. & B. 31; *Crossley & Sons (Limited) v. Lightowler*, L. R. 3 Eq. 279. Leave and license is revocable: *Hewlins v. Shippan*, 5 B. & C. 221. There may be an abandonment of a right, and the Court may infer it: *Wood v. Leadbitter*, 13 M. & W. 838; *Gale on Easements*, 4th ed. 527 (old paging 354). This was only a grant of leave and license by parol, and the plaintiff could not give up by parol the right which he had acquired by twenty years' enjoyment.

McMichael, Q. C., supported the rule. The distinction here, which attention has not been called to, is, that the license is not to do something on some other person's wall, but on our own land.—[*Anderson*, Q. C. That was precisely the case in *Hewlins v. Shippan*, 5 B. & C. 221.]—We built these buildings by the express leave of the plaintiff, and that is sufficient: *Winter v. Brockwell*, 8 East 308. The plaintiff cannot take away the leave thus given after it has been acted on. The following cases were also cited: *Moore v. Rawson*, 3 B. & C. 332; *Crossley & Sons (Limited) v. Lightowler*, L. R. 2 Ch. App. 478, 482; *Parker v. Mitchell et al.*, 11 A. & E. 788; *Ward v. Robins*, 15 M. & W. 237; *Tapling v. Jones*, 11 H. L. Cas. 290; Con. Stat. C. ch. 88, secs. 38, 39; *Liggins v. Inge et al.*, 7 Bing. 682; *Coryton et al. v. Lithebye*, 2 Wms. Saund. 361, 367, 115; *Wood v. Manley*, 11 A. & E. 34; *Davies v. Marshall*, 10 C. B. N. S. 711; *Adams v. Andrews*, 15 Q. B. 284; *Robinson v. Grave*, 27 L. T. N. S. 648; *Ramsden v. Dyson et al.*, L. R. 1 H. L. Cas. 129; *Tulk v. Moxhay*, 2 Phillips 174; *Robson v. Whittingham*, L. R. 1 Ch. App. 442.

RICHARDS, C. J., delivered the judgment of the Court.

We think we may dispose of this case without considering how far the leave and license set up by the defendant may give to him a right in the soil and freehold of the plaintiff.

The first count of the declaration charges the defendant with breaking and entering the plaintiff's close. This, I

apprehend, is the *gravamen* of the charge, according to the rules of pleading. What follows, such as breaking down the wall, and carrying away the material thereof, and building a house on the wall, and depriving the plaintiff of the use of the wall, is matter of aggravation.

The plea of leave and license, it is said, must be co-extensive with the injury shewn. There is no injury shewn here that was inflicted after the leave and license was withdrawn that can properly be the subject of an action of trespass.

The defendant has literally done nothing since the alleged withdrawal of the leave and license. He has omitted to tear down his house and do certain other acts, which the plaintiff has virtually requested him to do. I fail to see how trespass would lie for that, or how this negligence or refusal to do what the plaintiff requests would of itself be a trespass, or make the defendant a trespasser *ab initio*.

As to obstructing the lights, the evidence seems fully to sustain the defendant's plea. It is a good plea at law.

Winter v. Brockwell, 8 East 308, in some respects resembles the case before us. There the plaintiff claimed damages because the defendant had placed a sky-light over a passage way over which he had an easement of passage as well as to light and air, and alleged that the sky-light obstructed the light and air to his house. The defendant set up, that the sky-light was erected with the express consent and approbation of the plaintiff, obtained before the inclosure was made, who also gave leave to have some of the frame work nailed to his wall. Some time after it was finished the plaintiff objected to it, and gave notice to have it removed. The learned Chief Justice, Lord Ellenborough, held that the license having been acted on by the defendant, and expense incurred, could not be recalled and defendant made a wrong-doer. A rule was moved for in term, but the motion was waived after the opinion of the Chief Justice was expressed. It is true he then referred to *Web v. Paternoster*, Palmer 71; which was afterwards overruled.

In *Liggins v. Inge et al.*, 7 Bing. 682, the head note is, "Plaintiff's father by oral license permitted defendants to

lower the bank of a river and make a weir above plaintiff's mill, on their own land, whereby less water than before flowed to plaintiff's mill : Held, that the plaintiff could not sue defendants for continuing the weir.

It was suggested in the argument, in *Davies v. Marshall*, 10 C. B. N. S. 704, that *Winter v. Brockwell* was qualified by the judgment of the Court of Exchequer in *Wood v. Leadbitter*, 13 M. & W. 838. Willes, J., said, "Not at all ; it was an act done upon the land of another person, and of a permanent character."

In giving judgment, Williams, J., said, at page 711 : "I do not accede to his (Mr. Kingdon's) suggestion, that *Winter v. Brockwell* and *Liggins v. Inge* are overruled or shaken by the judgment of Lord Wensleydale, in *Wood v. Leadbitter*.

Willes, J., referring to the plea in that action, said : "It certainly does set up either that the plaintiff actually gave his consent to the doing of the acts complained of, or that he so conducted himself that a reasonable man might fairly conclude that he did give that consent. Conduct in a Court of Common Law often does amount to an estoppel, and is evidence of leave and license, which is incapable of being controverted. I shall be surprised, if it shall turn out, as a matter of equity, that any conduct short of that or gross and intentional negligence would afford a foundation for a proceeding in Chancery to restrain a party from suing for acts of the description here complained of, where the defendant is not in a position to set up leave and license under one or other of the two heads at Common Law."

Davies v. Marshall, 10 C. B. N. S. 697, though deciding as to the effect of an equitable plea setting up substantially the same defence as is here pleaded by defendant, is a strong authority to sustain defendant's view as to the leave and license, and that it cannot be revoked.

The plaintiff himself, in his replication setting up the revocation, says, that before any of the alleged grievances in the second count he revoked the alleged leave, whereof defendant had notice.

As a matter of fact, the evidence shewed it was not so, and therefore the defendant was entitled to the verdict on the issue raised to the replication as well as on the plea.

In *Gale* on Easements, 4th ed., p. 527, it is laid down: "It has already been seen on the clearest authority, both of our own law and the civil law, that if the owner of the dominant tenement authorizes an act of a permanent nature to be done on the servient tenement, the necessary consequence of which is to prevent his future enjoyment of the easement, it is thereby extinguished. And provided the authority is exercised, it is immaterial whether it was given by writing or by parol."

The verdict should be for the plaintiff on the issues to the first, second, and fourth pleas, and for the defendant on the third plea, and on the replication to the third plea.

Judgment accordingly.

DAVIS ET AL. V. MCPHERSON.

Patents—Construction of—Description of Land—"N. W. $\frac{1}{4}$."

In 1857 a Patent issued for "the North Westerly Quarter" of a 200 acre lot, the side lines of which lot ran N. 45°W., and S. 45°E.; and in 1859 another patent issued for "the S. E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ " of the same lot.

Held, that the first patent covered 50 acres, extending half the depth and half the width of the whole lot, not 50 acres extending one fourth of the depth and the whole width.

Held, also, that the subsequent patent could not effect the construction of the first, for the question must be, what did the patent cover when it was issued.

Held, also, that the assignments to the respective patentees by the original purchaser from the crown of the N. W. $\frac{1}{4}$ of the lot, could not be resorted to to aid in interpreting the patents.

DECLARATION—Trespass *quare clausum fregit*, for the westerly half of the south east half of the north west half of lot one, in the fourth concession of the township of Camden, in the connty of Kent.

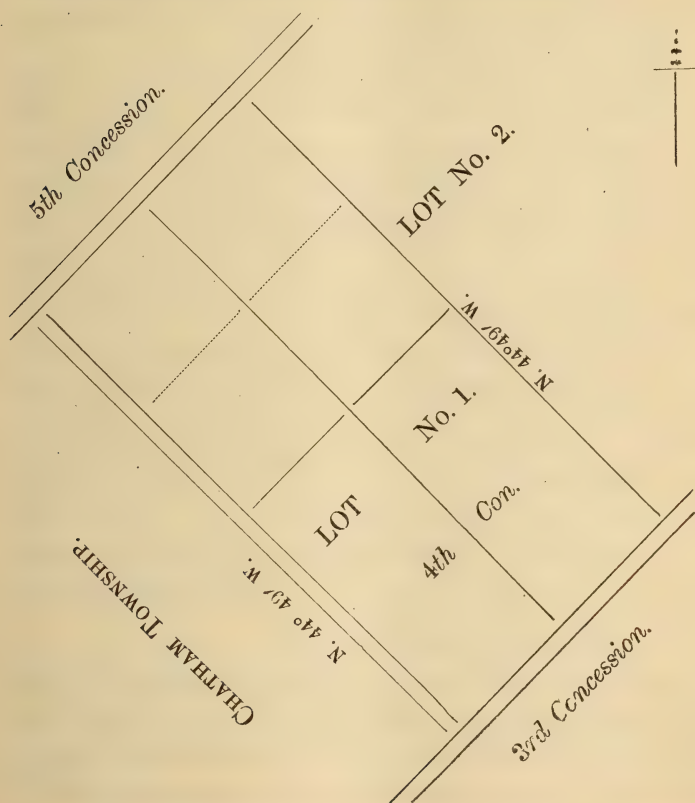
Pleas—1. Not guilty. 2. Land not the plaintiff's land as alleged. 3. That at the time of the trespasses, the whole north westerly quarter of lot one was the land and freehold of the defendant. 4. That the land was the land

and freehold of Sarah Jane Macpherson, the wife of the defendant, and he, as her husband, at her command and as her servant, did the act complained of.

The case was tried at the Fall Assizes, at Chatham, held before the D. J. Hughes, Esq., Judge of the County Court of the County of Elgin, acting as Judge of Assize, under the Statute, without a jury.

The only question in dispute at the trial was, what constituted the north westerly quarter of the lot in question. It was proved that the side lines in Camden, as laid out in the original survey ran N. 45° W. and S. 45° E., or N. W. and S. E. In the map produced from the Crown Land Department, the course was marked as N. 44° 49' W.

The following sketch will illustrate the case :



It was admitted, that unless the lot was to be considered as divided in such a way that the defendant's land would extend but half way across the rear of the lot, towards No. 2, and half the length of the lot between the fourth and fifth concessions, that the defendant had trespassed on the plaintiff's land, and the plaintiff was entitled to recover. But if the lot was held to be in the form and to cover the area as above indicated, the verdict should be for the defendant.

The plaintiff contended that the north-westerly quarter of the lot extended across the whole lot in the rear, bordering on the allowance for road between the fourth and fifth concessions, and extended towards the front of the lot the one quarter of the distance between the allowance for road in front of the fifth concession and the allowance for road in front of the fourth concession.

The patent under which the defendant claimed was first in point of time. It was dated on the 5th of May, 1857, and granted to Duncan McPhee, that parcel of land situate, lying and being in the township of Camden in the county of Kent, containing by admeasurement fifty acres, be the same more or less, "being composed of the north-westerly quarter of lot number one, in the fourth concession of the aforesaid township of Camden."

The next in point of time, as far as appeared at the trial, was the patent under which the plaintiff claimed, which was dated on the 8th November, 1859, and granted to Martin H. Freeman in fee, all that piece of land situate in the township of Camden west, in the county of Kent, containing by admeasurement fifty acres, more or less, "being composed of the south-east half of the north-west half of lot number one, in the fourth concession of the aforesaid township of Camden west."

The plaintiff gave evidence that the northerly one hundred acres of the lot were originally purchased by one John B. Williams from the Crown : that he sold his right to fifty acres to Duncan McPhee, and to the other fifty acres to Martin H. Freeman ; and that in the assignment which he

made to McPhee, and which was produced from the Crown Land Department, he described the fifty acres sold by him, as "being composed of the north-west quarter of lot number one in the fourth concession of the township of Camden aforesaid, otherwise known as the north-west half of the north-west half of the said lot."

In the assignment to Freeman, also produced, the fifty acres were described, as "being composed of the south-east half of the north-west half of Clergy Reserve lot number one in the fourth concession of the said township of Camden."

The defendant's counsel objected to the admission of this evidence.

The plaintiff had occupied the land about four years, and the defendant about two years.

It was said that the defendant had at first cut on the rear fifty acres of the lot, as if that was what he owned, and afterwards claimed that his land only went half way across the lot, but extended half the length of the concession towards the front.

The plaintiff always claimed that he was entitled to the fifty acres which extended across the lot, and which lay next the fifty acres of the like shape which adjoined the fifth concession.

The surveyors, in giving their evidence, all agreed that generally, in dividing a township lot, they would run a line from front to rear parallel with the side lines of the lot, and another line across the centre at right angles, thus making fifty acres of like shape and size and of the same form as the original lot, which was thus divided into quarters. But when asked if this lot in question was divided so as to make the north-west half of the lot by a dividing line running across at the centre of the lot at right angles to its side lines; then, having thus obtained the north-west half of the lot, is not the north-westerly quarter of the lot that which is the northern and western part of that half lot, some of the surveyors said they thought it was; some said they could not say.

On the map produced from the Crown Land Department, the names of the four patentees were written across the whole lot, above each other, but it was not shewn when or by whom they were thus written.

The learned Judge found for the plaintiff \$1 damages, with a certificate for the full costs.

He added, that if he had been trying the case with a jury, he would have charged, that reading the two patent deeds produced together, it was consistent with the rights of each, so as to give each of these parties his own quantity of land, to presume that the government laid out these parts of lot one in the fourth concession according to the plaintiff's contention; and that in order to ascertain where the north-west quarter of a lot is, it is not necessary first to divide the whole lot into two parallelograms by a line running through the middle of the lot, from one concession to the other, although as the surveyors say, that is done "as a matter of practice;" that looking at all the evidence, in the absence of the field notes of the original survey, and in the absence of a description in the patents by metes and bounds, we have a right to presume that the lot was sub-divided according to the mode by which the two patents could be reconciled with each other, so as to give to each patentee [or person his whole quantity of land, and that mode of reading these patents is consistent with what the plaintiff claims, but irreconcilable with the contention of the defendants.

Leave was reserved to defendant to move to enter a verdict in his favour, if on the evidence the Court should be of opinion that the defendant was entitled to the verdict; the Court to be at liberty to draw inferences as a jury, and either party to have any objections to the admissibility of evidence which appeared on the notes."

In Michaelmas term, *McMichael*, Q. C., obtained a rule *nisi* to set aside the verdict, and to enter a verdict for defendant, pursuant to leave reserved, or for a new trial, the verdict being contrary to law and evidence and for

misdirection ; and for the admission of improper evidence to contradict or vary the meaning of the patent granting the land in dispute in this cause ; and on the ground that the learned Judge who tried the cause, should have found a verdict for the defendant.

On the argument, certificates from the Crown Land Department were put in by consent, shewing that on the 10th of October, 1856, a description was issued from the Department for a grant to Isaac Ingram for the south-east half of the south-east half of the lot ; and on the 13th of October, 1856, a description issued for a grant to Robert Ingram for the north-west half of the south-east half, each containing 50 acres more or less.

The rule was enlarged until this term, when *Robinson*, Q. C., shewed cause. The verdict is clearly right. The important fact to bear in mind is, that the lot in question lies in length, from concession to concession, north 45° west—*i. e.*, the side lines run exactly north-west and south-east. If, instead of this, the lot lay due north and south, there can be no question that the north quarter would mean the north 50 acres, running across the whole width of the lot. How then can the north-west quarter of a lot which lies due north-west and south-east, mean any thing but the north-west 50 acres running across the same width ? Again, the north-west half of the lot would certainly mean the north-west 100 acres extending across the whole width. It must follow that the north-west half of the north-west half would mean the north-west 50 acres of this 100, also extending the whole width. If so, surely the north-west half of the north-west half, and the north-west quarter, must mean the same thing. It is to be observed that the patent says the “north-westerly,” not the “north-west” quarter ; but the meaning is the same ; *Johnson v. Lindsey*, 3 Johns. Cas. 86 ; *Jackson v. Reeves*, 3 Cai. 293 ; *Seaman v. Hogeboom*, 21 Barbour 398, 404, Abbott's N. Y. Dig. “Deed,” 371. The proper construction of the patent therefore, taken by itself, sustains the verdict ; and the other

evidence plainly shews that this was the intention both of the Crown and of the patentees, under whom both parties here claim. The assignments by Williams were admissible; they were filed in the Crown Land Department, and it was upon them the patents issued to the respective assignees, through whom plaintiff and defendant claim. They were admissible to aid in interpreting the patents, in the same way as descriptions of land for patent have been received, though forming no part of the patent itself: *Hagarty v. Britton*, 30 U. C. R. 321, 336-7. The description in the assignment to McPhee, under whom defendant claims, is the north-west quarter, "otherwise known as the north-west half of the north-west half," shewing that by the north-west quarter was understood the 50 acres according to the plaintiff's construction. In the assignment to Freeman, the description is the south-east half of the north-east half. Had the description in the patent to McPhee followed the assignment, or been simply "the north-west half of the north-west half," there could have been no question; and this is plainly what was intended. Other patents also are admissible to aid in the construction: *Clark v. Bonnycastle*, 3 O. S. 528; and the two patents should, if possible, be construed so as to give both full effect. This is done by the plaintiff's construction, which makes the two grants cover the whole north-west half. According to the defendants argument, 25 acres of the 100 is left ungranted, for it is impossible to contend that the patent to Freeman, under which plaintiff claims, for the "south-west half of the north-west half," can cover what, according to defendant's contention, would be properly described as the north-east quarter of the north-west half. The crown plainly intended by the two patents to convey the north-west half, for each patent purports to grant 50 acres, and the descriptions for patent in 1856, for the north-west and south-east halves of the south-east half, confirm this.

In the Crown Land map, the names of the different patentees are written across the lot, so as to shew that each was intended or supposed to have fifty acres fronting

on the side road; and the defendant's conduct in cutting timber off the part which he now says is not covered by his deed, shews that he took possession under the same belief. As to the effect of this as shewing acquiescence by defendant, see *Hart v. Brown*, 10 Grant 266. He also referred to *Horne v. Monro*, 7 C. P. 433.

McMichael, Q. C., contra. The patent to McPhee, under which defendant claims, being prior in time, must govern, and the subsequent patent to Freeman cannot affect its construction. Its meaning must be ascertained by considering what land would be covered by the description, "north-west quarter," at the time the patent issued. The cases in our own Court referred to, shew that original field notes and plans existing before the patent, may be referred to as surrounding circumstances, but the meaning of the grant must still be ascertained by the words used: *Clark et al. v. Bonnycastle*, 3 O. S. 528. The north-westerly quarter of such a lot would be understood both by surveyors and others to mean what the defendant contends for.

RICHARDS, C. J., delivered the judgment of the Court.

The reasonable and usual understanding, when the quarter of a lot is referred to by the points of the compass, is, that the whole lot is divided into four quarters, preserving the original form of the lot, but apportioning the quarters according to those points of the compass which will correspond with that expressed in the description. The plans put in at the trial shew that the surveyors, when speaking of the division of the whole lot into four quarters, would understand the division in the way I have mentioned; but when asked the question, "supposing this lot to be divided, as it is suggested it was when first sold by the government, into the north-westerly half and south-easterly half, each one hundred acres; now if the rear one hundred acres is the north-west half, as all admit it is, is not the north-westerly quarter that fifty acres which is across the rear of the lot; or, in other words, is not the quarter which is across the rear of the lot, that *quarter* which is most northerly and westerly?"

In this view, no doubt, the plaintiff's case can be worked out. But suppose a north-westerly half, and that half is to be formed into a north-easterly and a north-westerly quarter, where is the north-easterly quarter to come from, if the whole rear of the lot is taken up to make the north-westerly quarter? Does not the very expression, "north-easterly quarter," imply that a division of the lot is made into quarters that may each be described by the four cardinal points of the compass in that way? And the north-easterly quarter certainly should have a portion of the northerly line and easterly line of the lot; but in the plaintiff's view there could be no north-easterly quarter.

The mere entry of the names of the grantees on the lots, as shewing the grant of the rest of the lot dividing the two hundred acres into fifty acre parts, each running from the side line to the limit between lots one and two, cannot affect the rights of the grantee under the patent of 1857. These entries were probably made on the plan after the descriptions were issued of these lands. The south-east half of the lot is by the description in the deeds themselves, properly entered as each fifty acres running across the lot. And then comes the grant under which the defendant claims, and that fifty acres is described as the south-easterly quarter of the lot.

The question must always be, what did the deed cover when it was made? It could not be considered an uncertain description from May 18th, 1857, to December, 1859.

Suppose the patent, under which the plaintiffs claimed had described the land as the north-easterly quarter of the lot; can there be any doubt his deed would have then passed to him the fifty acres with the proportionate share of the length and breadth of the lot, to correspond with what the defendant now claims, was granted by the patent for the north-westerly quarter of the lot? And there certainly would not then have been any dispute as to what portion of the lot was covered by the patent under which the defendant claims.

Can then the issue of another patent by the crown more than two years after the issue of the one under which he claims, make any difference as to his rights under the prior patent? I have not met with any authority which would justify us in coming to such a conclusion.

There is no ambiguity in the description of the land in the patent under which the plaintiff claims, and I do not see how we can resort to the evidence of Mr. Williams as to what he sold to the patentee, or to his deeds which preceded the government patents, so as to interpret the meaning of the patents.

Perhaps if the patent under which the plaintiff claims had been issued first, and then the one under which defendant claims, there might have been a resort to extraneous evidence to reconcile them, not by taking any of the plaintiff's land, but by applying the grant to cover what would otherwise be ungranted land in that lot

There was no evidence to shew that there was any original survey on the ground of this particular lot, or of lots generally in that township, by which the lots were subdivided into sections of fifty acres each, and each section extending across the whole width of the lot. What the evidence shewed was, that the two persons who had purchased the front one hundred acres, had procured deeds from the government for each of their fifty acres according to that form; and the patents express the description unmistakably in that way. The first patent which they issued, for fifty acres of the rear hundred, does not describe the fifty acres as being either the north or west *half* of any particular half of the lot, as the deed of the land in front does, but grant a north-westerly *quarter*, shewing a change in the words as applicable to the description of fifty acres; and such words have in relation to quarters of lots a meaning different from what simply saying fifty acres of a lot off the north end, or similar words, would have.

When making out the patent under which the plaintiffs claimed, for some cause they choose to describe that fifty

acres, not as a certain quarter of the lot, but as the south-westerly half of the north-westerly half of the lot. It may be and probably is a mistake so to have described this particular fifty acres in this way, after the other conveyance of fifty acres of that one hundred had been described differently.

If the defendant's land had been described as fifty acres, being the north-west half of the north-west half of the lot; then, of course, all would have harmonized, and then the description of defendant's lot would have been as unmistakable when it was issued, as it was when the plaintiff's was issued. And the same rule, I think, must apply as to the construction of the grant.

There was no taking possession of the land by the defendant until about two years ago, and from the evidence it appears there had previously to that been a survey made of the land, shewing the north-westerly quarter as the defendant now contends it is. The defendant tried to sell the lot, but was told there was a difficulty about the patent under which he claims covering the whole of the north end.

I do not see that any question can arise as far as he is concerned from election. The patent under which the plaintiffs claim, of course covers no part of the lot which they wish to contend the defendant can properly claim under the patent for the north-west quarter; so that the plaintiffs taking possession prior to the defendant cannot be considered an election by the defendant under the circumstances, which will waive any rights which he has acquired under the patent and deeds to him.

The rule will be absolute to enter a verdict for defendant, pursuant to leave reserved.

Rule absolute.

ROCHE ET AL. V. KEMPT.

Promissory Note—Accommodation maker—Principal and surety—Opening up an account stated.

Action upon a promissory note made by defendant payable to one M., and endorsed by M. to the plaintiff. Third Plea: that the note was made for the accommodation of M., and before suit was paid by M. to the plaintiffs.

At the trial it appeared that defendant made the note for M.'s accommodation, of which the plaintiffs were aware, and that there was an agreement between the plaintiffs and M., to which defendant was not a party, and by which if on a final settlement of accounts the plaintiffs were indebted to M., such balance should be applied first in liquidation of this and other notes, and in the event of a loss, it was to be borne *pro rata* by the several indorsers. It also appeared that there had been a settlement between M. and the plaintiffs, signed by them, by which M. was found to be indebted in a large sum; but M. in his evidence stated that he had not got credit in that balance for some of his timber taken by plaintiffs. Defendant offered evidence to prove that under the accounts between M. and the plaintiffs there was a balance due to M., which, under the agreement referred to, would shew this note to be paid by M.

Per Morrison, J.—Such evidence was properly rejected, and could not be given under the plea of payment by M., but the agreement and facts relied on should have been pleaded specially.

Per Wilson, J.—The evidence was admissible, and it was competent to defendant to open up the account between M. and the plaintiffs.

ACTION by plaintiffs as indorsees against defendant as maker of a note, payable to the order of A. Macaulay, for \$3,000, dated at Quebec, on the 27th of August, 1864, payable at Lindsay, at three months after date, and endorsed by Macaulay to the plaintiffs.—Common counts were added.

Pleas—To the first count. 1st. *Non fecit*. 2nd. That the note was made for the accommodation of Macaulay, &c., as the plaintiffs well knew. 3rd. That the note was made for the accommodation of Macaulay, &c., and, before suit, was paid by Macaulay to the plaintiffs. 4th. On equitable grounds: that the defendant made the note for the accommodation of Macaulay, for the purpose of his endorsing the same to the plaintiffs as security for \$3,000, then owing by Macaulay to the plaintiffs; and that there was no other consideration for making the said note; averment of endorsement and delivery of the note by Macaulay to the plaintiffs, and that while the plaintiffs were holders,

without the consent, &c., of defendant, and for a good consideration, the plaintiffs gave time to Macaulay for payment, &c., after the note became due. 5th. That the note was given, &c., for the purpose of being discounted by the plaintiffs, &c., that the plaintiffs discounted the said note, and afterwards paid and retired it, &c. 6th. That the plaintiffs by express renunciation and waiver, &c., exonerated and discharged the defendant from payment of the note, &c. 7th. Never indebted, to the common counts. Issue.

The case was tried at Cornwall, at the Fall Assizes, 1871, before Richards, C. J., without a jury.

The making of the note sued on was admitted at the trial under a notice to admit.

The defendant was called. He stated that the note was the renewal of a draft of Macaulay on the plaintiffs to his order, dated 2nd May, 1864, for \$3,000: that he was only liable as surety on that note for Macaulay, and that it was drawn by Macaulay on the plaintiffs for advances; that he became surety under an agreement dated 20th April, 1864, made between Messrs. Roche & Macaulay, which was produced.

This agreement of the 20th of April, 1864, was made between Messrs. Roche & Macaulay, and the material part of it was as follows: "Upon a final settlement of accounts between Messrs. Roche & Macaulay, any balance appearing to the credit of Macaulay shall be applied to the liquidation of the paper upon which Messrs. Kempt, Green, and Kennedy, are respectively held, and no other disposition of such balance (if any), shall be made until those notes are paid. And in the event of a loss, that it shall be borne by the several endorsers *pro rata*."

This defendant was not a party to the agreement.

The defendant also stated that previous to that he was on a note of Macaulay's as indorser for \$3,000, which was under protest and unpaid until that agreement was entered into, and which note was afterwards taken up: that on the 2nd of May, he endorsed a draft of Flanagan and Roche

of Quebec, for \$3,000, which was not paid and went to protest in some Bank: that defendant went to Quebec, where Mr. Roche called on him, and said that the draft had been retired by him, and that he wanted it put in another shape to use the money over again; and that the defendant gave him his note for \$3,000 payable to Macaulay: that defendant asked how Macaulay was getting on, and that Roche said he thought he would be behind: that defendant said that he understood when he gave the note, he was to be a surety for Macaulay in the matter, but he supposed under the agreement he would be liable to pay his portion of the deficiency. He said he was not to be relieved from liability, unless Macaulay's account shewed a sufficient balance in his favor to discharge that liability with the others. The defendant recognized a note produced to him by the plaintiffs for \$3,000, dated the 20th of April, 1864, at three months, in his handwriting, made by himself, payable to the plaintiffs; also a draft drawn by him for \$3,000 on the plaintiffs, payable to Macaulay, dated the 30th of April, 1864, and that he thought he received a protest of the latter one; that when he gave the note sued on, Roche told defendant that Macaulay would be behind; and he, defendant, expected to pay his portion of what Macaulay was behind: that he saw an account which had been rendered to Macaulay, shewing a balance against him of \$3,000; the principal items of this account were charges made before the date of the note sued on, and the debit side amounted to \$69.164.99.

Alexander Macaulay, the endorser, was also examined. He said that he endorsed the note sued on, but had no recollection of doing so; that defendant previously was an endorser for him for \$3,000. Witness could give no information respecting the other note and draft for \$3,000 mentioned in the defendant's testimony.

An account was produced which was admitted to be a copy of the account in the plaintiffs' books. The account shewed a balance of \$5,765.38 due by the witness to

Flanagan & Roche. An item of commission charges was charged at 5 per cent, but carried out at $7\frac{1}{2}$ per cent. which had been previously charged, being an over-charge of \$1,583.28. Witness said he called attention to the error at the time the account was produced to him. The witness afterwards became insolvent. He also spoke of some timber in 1864 left in the woods, which Flanagan & Roche sold, and as to which the witness had no recollection of being furnished with an account. He said that Roche about January, 1865, told him he sold it. That the capital to carry on his business, was advanced by plaintiffs; that he had about \$2,000 to his credit on the transactions of 1862 and 1863. In 1863 and 1864 he was getting worse. That he came to a settlement of accounts with Roche in 1865: that the balance against him was \$5,777.18; that, while he objected to the settlement, he signed it, because Roche led him to believe that he would carry him over the next season: that he objected to the charge of $7\frac{1}{2}$ per cent. commission and a charge of \$400 for the culler: that he gave Roche a mortgage in March, 1864, without his asking for it, as security on real estate, and goods and chattels.

The defendant's counsel at this stage proposed to shew that under the accounts between Macaulay and the plaintiffs there was a balance due to Macaulay, and under the agreement that would shew the note sued on to be paid by Macaulay; and he contended that the defendant, not having been present at the settlement was not bound by it.

On the other side, it was objected, that under the pleas the matter was not open to the defendant, the accounts having been settled, and a large balance shewn to be due to the plaintiffs: that this matter of defence should be set up by plea, according to the terms of the agreement, and could not be set up on the trial in the nature of a set off.

The learned Chief Justice concurred in the view taken by the plaintiffs' counsel.

An affidavit of Roche made in the Insolvency proceedings of the defendant was put in, setting out that the defendant was indebted to him, as member of the firm of

Flanagan and Roche, in \$5,271.04, as shewn by the accounts, &c. : that he held as security a mortgage made by the insolvent, Kempt, dated the 2nd of March, 1864, and that the value of the security was \$500.

The Insolvency proceedings were not otherwise proved or admitted.

It was also admitted that the item of the 6th of December, 1864, of \$3,090.48, in the account was the note now sued on.

The learned Chief Justice found in favor of the plaintiffs for \$4,245 ; the defendant's counsel objecting, as above noted on the ground of misdirection and for rejection of evidence.

In Michaelmas term, *J. K. Kerr*, obtained a rule *nisi* to enter a verdict for the defendant, on the ground, that on the evidence the defendant was entitled to a verdict ; or for a new trial, on the ground of misdirection and rejection of evidence to impeach the settlement of accounts between the plaintiffs and Macaulay ; and the refusal to allow evidence to shew that if the account were properly adjusted, there would be a balance applicable to the payment of the note sued on, sufficient to pay the same in full.

During Easter term last *S. Richards*, Q. C., shewed cause.

Kerr, contra, cited *Thomas v. Hawkes et al* 8 M. & W. 140 ; *Cook et al v. Lister*, 13 C. B. N. S. 543 ; *Jones et al v. Broadhurst*, 9 C. B. 172 ; *Lazarus v. Cowie*, 3 Q. B. 459 ; *Southall v. Rigg*, 11 C. B. 481 ; *Gillett v. Whitmarsh et al.*, 8 Q. B. 966 ; *Richards v. Macey*, 14 M. & W. 484 ; *Pollard et al v. Bank of England*, L. R. 6 Q. B. 623.

MORRISON, J.—The question, in my opinion, to be determined is whether, under the third plea, (the plea of payment), the defendant was entitled in proof of that plea to rely on the agreement of the 20th April, 1864, made between the plaintiffs and Macaulay, and to give evidence to impeach a settlement of accounts, made between them, under that agreement ; or to shew that if the accounts were otherwise properly adjusted, there would be a balance

due from the plaintiffs to Macaulay which would be applicable to the payment of the note sued on.

Assuming that there was a settlement of accounts between the plaintiffs and Macaulay, and an undisputed amount found in favor of the latter, sufficient to meet all the notes referred to in the agreement, or some portion of them, I am not satisfied that in that case it would not be necessary, to enable the defendant to shew his non-liability under such circumstances, to plead the agreement and the fact of the balance being so found in Macaulay's favor.

It seems to me that the defendant cannot, under his third plea, go into evidence to impeach the settlement made between the plaintiffs and Macaulay, shewing a balance against the latter, and to open their accounts so settled, or, on the other hand, in the case of no such settlement of accounts having taken place, that the defendant under his third plea could, as proof of that plea, go into evidence to shew, that upon a proper adjustment of the accounts between those parties, there would be found a balance applicable to the note sued on.

In my opinion, if the defendant rested his defence upon such grounds, he should have pleaded specially, setting out the agreement and facts relied on, and so intimated to the plaintiffs the grounds upon which he would contend that he was discharged from liability as maker of the note in question.

I may further remark, that it seems to me, that if Macaulay had been sued by these plaintiffs for the amount of their account produced at the trial, or upon this note which formed an item in that account as money paid for Macaulay, that he, Macaulay, if he relied for a defence that he was not indebted to the plaintiffs, he could only do so by a plea of set-off for the value of the timber he sent to the plaintiffs, if he, Macaulay, did not acquiesce in the credits allowed him in respect thereof, or for the value of other timber not credited by the plaintiffs.

I do not think Macaulay could have shewn that the timber was of more value, or that certain timber or other items were not credited, under a plea of mere payment.

And so, in this case, I do not think that the defendant, under his third plea, could set up a like defence.

Macaulay was examined at the trial. It was not contended or attempted to be shewn, that there was any specific appropriation of any particular moneys received by the plaintiffs, to be applied specifically to the payment of this note, and so in that way shew payment of it.

On the whole, I think the rule should be discharged.

WILSON, J.—As a rule, the admissions of a principal are not evidence against the surety, nor is a statement of accounts made by the principal with the creditor, evidence against the surety.

Entries made by a principal in the usual course of his business as a collector, bank clerk, &c., are evidence, after the death of the principal, against the surety, but during the life-time of the principal, if he can be called as a witness, he should be called to prove the facts to which his admissions or statement of accounts relate.

There are many cases on this point. I may refer to *Pritchard v. Hitchcock*, 6 M. & G., 151, as applicable between these parties.

On the note in question, the defendant was an accommodation maker, and the plaintiffs knew it. He has pleaded that the note was paid to the plaintiffs. He certainly did not pay it, but he says Macaulay, the payee and indorser of the note, and for whose accommodation he, the defendant, made it, paid the note, and that he is entitled to take the benefit of that payment. And the case of *Cooke v. Lister*, 13 C. B. N. S. 543, shews that payment by a prior party than the defendant to a bill or note is a good defence, when the defendant is an accommodation party for the one who has paid the note, because, in such a case, the one who has so paid it can never sue the accommodation party, and so the holder of the note or bill cannot do so either, when he is only enforcing the rights of the person who was accommodated.

Now, if Macaulay did pay it that was a payment in

effect by the defendant, because the plaintiffs knew Macaulay was the principal, and the defendant only the surety, or accommodation maker for Macaulay.

That point being established, the next question is, had the defendant the right to go into an investigation of Macaulay's accounts with the plaintiffs in order to prove or to endeavour to prove payment? I think he had.

It may be said, the lumber and timber which Macaulay made for, and delivered to, or sold and delivered to the plaintiffs were not *payment* of his debt. Properly and ordinarily they would not be. But if the debt to the plaintiffs were contracted by Macaulay to be acquitted and satisfied in that way, I think the lumber and timber delivered would be so much in performance and discharge of the contract, and a payment or payments or in the nature of payment; or, at all events, they might be treated as payments when they were credited in or taken on account.

It is said, if A. sell goods to B., who is to give a bill in satisfaction, and he does so, he is discharged although the bill be not paid, for the bill was payment; but otherwise, if the bill had been taken in discharge of a precedent debt: *Clark v. Mundal*, 1 Salk. 124.

So a goldsmith's note, given at the very time of buying goods, is payment: *Anon.* 12 Mod. 408. If it be agreed to be taken as cash: *Ward v. Evans*, 2 Salk. 442: *Smith et al. v. Mercer et al.*, L. R., 3 Ex. 51.

A defendant who had collected so much money for the plaintiff, deducted £40 for his own reward. The plaintiff sued him for the £40, and objected at the trial, that the defendant should have pleaded a set-off. Held, that the plaintiff could recover no more than remained after deducting all just allowances out of the very sum demanded.

This was not in the nature of a cross demand or mutual debt; it was a charge which made the sum received for the plaintiff's use so much less: *Dale v. Sollet*, 4 Burr. 2133. See also *Green v. Farmer*, 4 Burr. 2221.

A purchaser of goods gave the vendor's agent the vendor's dishonoured bill, in payment. The agent at first re-

fused it, but afterwards took it and gave it to the vendor, who kept it. Held evidence of payment : *Mayer et al.* v. *Nias*, 1 Bing. 311.

Payment may be in goods as well as in money, as, if a party deliver goods as for a particular amount, together with a balance in money. The goods would be delivered as a payment, *pro tanto*, and it would be a question for the jury : *Cannan et al.* v. *Wood et al.*, 2 M. & W. 465, 467, per Alderson, B.

In *Hooper v. Stephens et ux.*, 4 A. E. 71, an agreement to take goods in payment of a debt, and a delivery of such goods accordingly, is a good payment.

Lord Denman, C. J., said : " Where anything is received, upon agreement, in reduction of a debt, that is payment sufficient to take the debt out of the statute of limitations." See also *Hart v. Nash*, 5 Tyr. 955 ; *Waller v. Andrews, et al.*, 3 M. & W. 312.

A transfer in bank books, from a debtor's account to the creditor's account, upon a direction by the creditor to pay the money into the bank to his credit, is a payment : *Eyles v. Ellis*, 4 Bing. 112.

So the crediting by an agent to his principal of certain moneys, which the agent is authorized to collect, will be a good discharge of the debtor of the principal, when the agent has settled with the debtor, by setting off his own account against the debtor, and when that is the known course of business as between brokers and their employers : *Stewart et al. v. Aberdeen*, 4 M. & W. 211.

A right to deduct is not merely a set-off : *The River Steamer Co., Mitchell's Claim*, L. R. 6 Ch. App. 822.

In *In re Mercantile Trading Co., Schroder's case*, L. R., 11 Eq. 131, payment of shares in Confederate bonds, money or money's worth, is a good payment.

It is said a payment in tea, in one case, was held to be a good payment.

An agreement to set-off mutual debts, is not a payment : *Rowland v. Blakesley et al.*, 1 Q.B. 403.

As the defendant was entitled to be satisfied whether

Macaulay had paid the note or not, and as he was entitled to investigate the accounts between Macaulay and the plaintiff for that purpose, and as the items of debit and credit in that account may, from the nature of the dealings and agreement of the parties, be items of charge and of discharge, or payment, I think the defendant should have been allowed to have made such enquiries into these accounts as would have permitted the question to be determined, whether Macaulay had or had not in the course of his dealings with the plaintiff paid the note.

How far that investigation may require the whole accounts to be unravelled, I cannot say, but if it do require it, the defendant must be at liberty to prosecute it, however tedious or inconvenient it may be, if it be his right to do so.

In my opinion, the rule should be made absolute.

RICHARDS, C. J.—Not having been present at the argument, gave no judgment; and the Court being thus equally divided, the rule dropped.

CROCKER ET UX. V. SOWDEN ET AL.

Ejectment—Lease—Surrender by operation of law—Married women—Rights, &c., of during imprisonment of husband for felony.

Ejectment by H. C. and E. C. his wife. The defendant S. limited his defence to two shops erected on the land sued for, and defendant G. to one of said shops as tenant of S. It appeared that while H. C. was in prison for felony, and on the 29th October, 1869, S. leased the premises to E. C. for two years from the 1st of June, 1870, at \$200 a year, and S. covenanted to erect on the premises by the 1st of June, a tavern worth at least \$1000. Afterwards S. proposed to erect, and did erect without opposition from E. C., a more expensive hotel, with two shops under it, (which were the shops referred to) and made other important alterations at a total expense of \$3000. Defendant G. applied to E. C. for a lease of one of the shops, and was referred to S., and S., after seeing E. C., who said she did not want the shops, leased one to G. E. C. afterwards refused to give up possession until paid for delay in getting possession of the tavern until after the 1st of June. The amount was left to arbitration, and E. C. said she would allow G. to take possession, but after he had placed some of his goods in the premises she put them out and locked the doors, which the defendants then forced open and took possession. H. C. was during these transactions still undergoing his sentence.

Held, that during her husband's imprisonment for felony E. C. could contract at all events as to what might be regarded as goods and chattels, as a *feme sole*.

Semble, that a married woman may execute a deed without her husband joining during the imprisonment of the husband as a felon.

Held, also, that the facts above set out, and more fully appearing in the report, constituted a surrender, by operation of law, by E. C., or at all events estopped all parties from saying that S. had not the right to lease to G.

EJECTMENT for part of the north part of lot No. 12 in the 4th concession of Cavan.

Defendants appeared and defended for a part of the land in the writ, being the two shops lately erected by the said William Henry Sowden on the said lands, and then in the occupation of the said Robert Gott, and one Davis, respectively, the said William Henry Sowden limiting his defence to the said two shops: and the said Robert Gott limiting his defence to the shop then in his occupation.

The plaintiffs claimed title as follows; the said Elizabeth Crocker, under an indenture of lease made to her by the said defendant William Henry Sowden, dated the 28th of October, 1869; and the said Henry Crocker as the husband of the said Elizabeth Crocker.

A notice was also given calling on the defendants to shew on the trial what legal right they had to the possession of the premises.

In their notice of title the defendant Sowden, besides denying the title of the plaintiffs, asserted title in himself to the part claimed in his defence by the surrender of the estate of the plaintiffs therein to him by operation of law ; and the defendant Gott, besides denying the plaintiffs' title, claimed title in himself in the piece to which his defence was limited, as tenant thereof to Sowden.

The defendants, also, by notice limited their defence to the two shops, as they did in their appearance.

The cause was tried at the Spring Assizes of 1872, before Wilson, J., without a jury.

It appeared from the evidence that on the 28th October, 1869, a lease in writing was made between William Henry Sowden of the first part, called the lessor, and Elizabeth Crocker, wife of Henry Crocker, of the second part, called the lessee, by which the lessor demised to the lessee the land described in the writ, to hold for two years from 1st day of June, 1870, at a yearly rent of \$200. And the lessor agreed at his own cost to erect and build, and complete in every respect and particular, and have ready for use and occupation by the 1st of June, on the demised premises, a building in every way suitable for a tavern, and worth when complete at least \$1000, together with sheds and outbuildings therefor.

At the time the lease was executed, and at the time the difficulty arose as to the possession of the two shops defended for, the husband of the lessee was in prison, having been convicted of felony.

After the lease was executed, the lessor proposed to erect a more expensive building, with two shops under a portion of it, and an additional kitchen, and otherwise change the place, the lessor keeping the two shops which were finished separate from the rest of the building, without communication with it from the interior of the shops, which was accordingly done. The room finished for shops was

originally intended as a dining room, but on the change of plan the dining room was placed up stairs, and the new kitchen was adopted. The building, as finally erected and on the plans as changed, instead of costing \$1000, cost over \$3000.

Mrs. Crocker had intended renting the east shop formerly intended for the dining room.

When Gott applied for the place, he first asked Mrs. Crocker as to whom he should apply to for a lease, and she referred him to Mr. Sowden. He (Gott) and Sowden went to Mrs. Crocker, Sowden having said that Mrs. Crocker had the refusal of it, and if she did not want it Gott could have it. On going to Mrs. Crocker, she said she would let him know if she wanted it. Afterwards Gott saw her, and she said she did not want the shop; the rent Mr. Sowden was asking for it was too high. Gott then rented the two rooms from Sowden.

Afterwards and on the 15th August, 1871, when Gott went to take possession, a difficulty occurred, Mrs. Crocker saying she would not give up possession unless Sowden paid her \$50, which she claimed for his not having the tavern ready by the 1st of June. Sowden then said to her that she had given up the shop. She said that did not make any difference, she could hold it. He said, if she thought she had a better right, there was the key, to take it. She did not take it, but said he had got the shop, and if she took the key he would make her pay rent. He said, certainly, if she had the right to pay it. They then spoke of leaving the matters in difference to a third person, and they finally agreed to leave it to Mr. Staples, and Sowden said he would pay whatever Mr. Staples said he should pay, if anything. Sowden asked Mrs. Crocker if she would allow Mr. Gott to come in on those conditions, and she said, certainly she would. On this he gave the key to Gott. Her objection to Gott coming in was, that Sowden had not finished the shed and house in time, and that she need not let Sowden rent that shop, the one Gott occupied, unless she liked.

The learned Judge held that Mrs. Crocker had a right to take the lease: that she could not convey her interest in the premises without the joinder of her husband, and the necessary certificate being given; and that she could not make a surrender by mere operation of law, but must surrender according to the statute.

He thought that what she did was unquestionably a surrender, if she had been a single woman. He had no doubt she concurred in the change of plan, in removing the dining room up stairs, and having the back kitchen in lieu of the dining room down stairs. And he had no doubt she did as a fact, allow Sowden to make the expenditure on the second shop for himself, and that that would be evidence of a surrender, or of a lease at a nominal rent or no rent. He had no doubt she permitted Sowden to lease the premises to Gott, and if she could be bound she was bound.

He entered the verdict then for the plaintiffs, with leave to the defendants to move to enter it for them, though they had that right without leave. He found all the main facts in controversy against the plaintiffs.

He found for the plaintiffs merely because, as a married woman, although her husband was in the Penitentiary, she could not convey or surrender without the statutory formalities.

In Easter Term *Armour*, Q. C., obtained a rule *nisi* to set aside the verdict and to enter a verdict for the defendants, pursuant to the leave reserved, on the law and evidence, and according to the provisions of the Law Reform Act.

The rule was enlarged to Michaelmas Term last, when *J. K. Kerr* shewed cause. The estate being in Mrs. Crocker vested in her husband: *Co. Lit.* 133 a; *Woodfall's* L. & T., 10th ed., 41, 44, 63, 64; *Smith's* R. and P. Prop., 3rd ed., 1084; *Shep. Touch.* 267, 303; *Emrick et ux. v. Sullivan*, 25 U. C. R. 115. The grant by a person attainted is good against every one but the Crown: *Wallace v. Adamson*, 10 C. P., 338; *Cole on Ejectment* 573; *Rex v. Bridger*, 1 M. & W. 145, where the lease was made after

the tenant in fee conveyed after being convicted of bigamy and sentenced to transportation ; 2 Inst. 55 ; *Rex v. Lady Mildmay et al.*, 5 B. & Ad. 254, in which it was decided on the custom of the manor as to persons convicted of simple felony. *Doe d. Griffith v. Pritchard et al.*, 5 B. & Ad. 765, is authority that ejectment will lie on the demise of a person attainted by felony until office found. It was admitted in that case an estate of freehold did not vest in the Crown until office found. See, also, *Nicholls v. Nicholls*, Plowd. 486 ; *Shep. Touch.* 232 ; *Vin. Ab. Alien A.*, pl. 18. *Ex parte Franks, Re Kezia Franks*, 7 Bing. 762, although deciding that a wife of a convict may be a trader and liable to become a bankrupt, yet the argument shews that whatever she may acquire vests in the husband. He also referred to *Chitty on Contracts*, 8th Ed., 171 ; *Marsh v. Hutchinson*, 2 B. & P. 226, 231. What was proven at the trial does not amount to a surrender at law. There can be no surrender of a part of the premises demised : *Lyon v. Reed, et al.*, 13 M. & W. 284 ; *Earl of Carnarvon v. Villebois*, *Ib.* 342 ; *Morrison v. Chadwick*, 7 C. B. 266 ; *Platt on Leases*, vol. ii., p. 508 ; *Bac. Ab. Leases*, s. 3.

Armour, Q. C., contra. The lease was after the Consol. Stat. U. C. ch. 73, and she took the estate under it as her own. *Barnett v. London and North Western R. W. Co.*, 5 H. & N. 604, and the cases there referred to, shew that the goods and chattels of a felon convict vest in the crown, and if the right of action here had been in the male plaintiff and for trespass for the alleged entry on the premises by the defendants, that would have vested in the crown and might have been so pleaded : *B. & L. Prec.*, 3rd. Ed., 565. The marital rights were suspended whilst Crocker was in the penitentiary, and for that time it is as if he were civilly dead and she a *feme sole*. She could part with her property, make contracts, and be bound by them, and could be sued : *Co. Lit.* 133. a.

In *Ex parte Franks, Re Kezia Franks*, 1 Moo. & Scott 1, all the law is discussed. The report is fuller than the same case in 7 Bing. 762. See also *Clancy on Husband*

and Wife, 3rd. Ed., 54 ; *In re Coward*, 34 L. J. N. S., Probate, 120 ; *Jarman on Wills*, 3rd. Ed., vol. i., p. 35 ; *Coombs v. Her Majesty's Proctor*, 2 Roberts. 547 ; *In the goods of Martin*, 2 Roberts. 405 ; *Curtis v. Prodger*, 2 Vern. 104. As to surrender, see *Phenè v. Popplewell et al.*, 12 C. B. N. S. 334 ; *Coffin v. Danard et al.*, 24 U. C. R. 267.

Under any circumstances, if the wife is capable of making a contract, what was done should create an estoppel.

RICHARDS, C. J., delivered the judgment of the Court.

In referring to the rule that coverture prevents a wife from being sued, it is laid down in *Com. Dig.*, Abatement, F. 2, under the head, "When a wife may be sued alone," as follows : "Exceptions to this rule arise in civil cases, where the coverture is suspended, when the wife may be sued as *feme sole*. As to which, where the husband has abjured the realm ; *Co. Litt.* 132, b. 133, a. The D. l. 4, c. 4, s. 1 ; been banished ; *Co. Litt.* 132, b. The D. l. 4, c. 4, s. 1, or transported ; 2 *Blk.* 1197 ; *Co. B. L.* 43 ; for his crimes. * * * See 1 *Lord Raym.*, 147 ; is a felon or an outlaw ; until in the first three instances he is lawfully returned, 4 *Esp.* 27, to this country ; and in the three last cases until his disability arising from his state of emnity, attainder, or outlawry has been removed, the wife is, for present purposes, a *feme sole*, the same as if unmarried."

In *Chitty on Contracts*, 8th ed., 171, it is stated that, "When the legal existence of the husband is considered as extinguished or suspended ; when he is dead in law—as in the case of his being under a sentence of a penal servitude for life, or a limited term—his wife may contract so as to render herself personally responsible, and may sue and be sued upon her contracts." *Lady Belknap's case*, Year Book 2 H. 4 f. 7 a ; 1 H. 4 l. Pl. 12 ; *Bac. Ab.*, Baron & Feme, M.; *Lean v. Schutz* Bl. Rep., 1197, 1199 ; *Marsh v. Hutchinson*, 2 B. & P. 23, are referred to as sustaining this view.

It is further stated, p. 171, "So although a convict sentenced to transportation remain in this country, (at the

Hulks), the wife may be considered as a *feme sole* while the sentence is in force." And reference is made to *Ex parte Franks* as authority for the last proposition.

Ex parte Franks, 7 Bing. 762, S. C. 1 Moo. & Scott 1, was decided after an elaborate argument, where many of the cases were referred to. The bankrupt was the wife of a person who was convicted of felony in 1821, and sentenced to transportation for fourteen years. After his sentence he was removed to one of the Hulks lying in Portsmouth harbour for the reception of convicts, where he had remained up to the time the case was stated for the Court in 1831.

The wife was allowed to visit him occasionally, holding communication with him by permission of the persons in charge of the convicts. Since her husband's conviction, she had carried on the trade of a china, glass and earthenware merchant, (which calling her husband had followed before he was convicted), for the benefit and support of herself and family. The Court held that she was liable to be made a bankrupt as a trader.

In *Jarman on Wills*, 3rd Ed., p. 35, the right of the wife to make a will under these circumstances is referred to, in this way, "A woman whose husband has been banished for life by Act of Parliament, or whose husband is attainted, may dispose by will of her real and personal estate; for as he is civilly defunct, she is restored to the rights and privileges of discoveriture. And the same rule seems to hold with respect to the wife of an alien enemy and of a felon convict transported for life." Citing *Re Martin*, 2 Roberts. 405; 15 Jur. 686; *Allen v. Hook*, 23 L. J. Chy. 776. "And where the husband is a felon convict, transported for a term of years, it should seem that, as his marital rights are suspended, the wife's disabilities ought to cease during the same period; and that consequently if he should die under sentence, a will made by her during his transportation ought to be effectual to pass property acquired by her in the meantime; but in the case of *Coombs v. The Queen's Proctor*, 2 Roberts. 547, 16 Jur. 820, Sir John Dodson decided that where the wife of a felon

under sentence of transportation for years died intestate, leaving property acquired after his conviction, such property belonged to the crown, and not to the next of kin. In the argument for the wife's next of kin, it was admitted that the property of a felon convict, whether acquired before the conviction, or afterwards during the term of transportation, was forfeited to the crown; but it was contended that the felony prevented the property acquired by the wife, subsequently to the conviction, from devolving on the husband. The learned Judge, however, seems to have assumed the latter point, and laboured only to prove the former. The grounds of his decision may be summed up in his own words, that 'on the death of the wife the property devolved to her husband; that is, would have devolved to him but for being a felon convict; *it devolved upon him*; he acquired, but cannot take it for himself; he acquires it for the crown.' Most of the reasoning upon which the learned Judge founded his decision is applicable to the case of transportation for life as well as transportation for years, and the decision itself is applicable to a case of testacy as well as intestacy. So that he would seem to disagree with the decision in *Re Martin*, which it is singular he did not notice in his judgment, though he himself argued it, and it was cited before him, and though he discussed a variety of other cases less nearly affecting the question before him."

Sir John Dodson in *Coombs v. Her Majesty's Proctor* referred to the views expressed in the then current edition of *Williams* on Executors, as sustaining the views he entertained. The following quotation from the last edition of that work, is against the decision in *Coombs's* case: "A woman, whose husband is banished by Act of Parliament, may make a will, and act in every respect as a *feme sole*. So where a married woman, whose husband was a convict, made a will, probate thereof was granted, on proof given that the property bequeathed was acquired by her subsequently to her husband's conviction, though he had received a conditional pardon from the Governor of the colony whither he had been transported for life:" *Williams* on Executors,

7th Ed., 63; citing *Pollard v. Prodgers*, 2 Vern. 104; *Compton v. Collinson*, 2 Bro. C. C. 385; *In the Goods of Martin*, 2 Roberts. 405; *In the Goods of Cowan*, 29 Jur. 569.

The decision that the property of the wife, acquired by her after the conviction of her husband and before the sentence of transportation or imprisonment had expired, would devolve upon the husband in case of her death, would not necessarily decide that she could not, as if she were a *feme sole*, during the period in which he was undergoing sentence make contracts that would bind all the world, at least during the time she was living and the disability of her husband continued.

Still I would feel more hesitation in coming to a conclusion as to the capacity of the wife to act as a *feme sole* under these circumstances after the elaborate judgment of Sir John Dodson in reviewing many of the cases, had not the case of *In re Coward*, 34 L. J. N. S. Prob. 120, S. C. 13 L. T. N. S. 211, 11 Jur. N. S. 569, held that the wife of a convict could by her will made after her husband's conviction, and whilst he was undergoing the sentence of transportation, devise her property acquired after his conviction. Administration was granted with the will annexed.

In giving judgment the learned Judge said, "On the authority of the cases you have cited, and especially of *Ex parte Franks*, I think I am justified in holding that a woman whose husband is a convict is to be regarded as a *feme sole* for the purpose, at any rate, of making a will."

I think the weight of reason and authority is in favor of holding, that during the period of the husband's transportation or imprisonment in the penitentiary for felony, (when the property which devolves on, or is acquired by, him passes to the crown), his wife, for the purpose of making contracts and disposing of her property, certainly that which may be considered as goods and chattels, should be considered as a *feme sole*.

Here, in the case before us, for the support of herself and family this female plaintiff took a lease of a house, in which

she was about to carry on the business of keeping an inn, She certainly, under the authority of the cases cited, could bind herself to pay the rent, and generally to do all acts reasonably necessary to carry on the business in which she was engaged.

It may be contended that she could not execute a deed to convey her interest in any real estate without being joined with her husband, or that she could not execute a deed to surrender the lease, or execute a new one under seal of any portion of the premises. It is not necessary to decide that; but if she is to have the power of a *feme sole*, I fail to see why she should not be able to do these acts.

It seems to me absurd, after the legislation that has taken place on this subject, to endeavour, by subtle reasoning and nice distinctions, to maintain that the wife of a convict had not the power to act as a *feme sole* when the occurrences took place out of which this action has arisen, when the statute recently passed by the Legislature of Ontario seems to have abolished in a great measure the disabilities, and even protections, which the law has formerly considered applicable to *femes covert*s.

But even if the wife of a convict could not execute a deed, cannot there be a surrender of a lease by operation of law arising out of her acts?

The case of *Phenè v. Popplewell*, 12 C. B. N. S. 334, shews that the Courts are inclined to carry the doctrine of surrender by operation of law much further than it was at one time considered the authorities would warrant.

Chief Justice Erle, at p. 340, said, "Anything which amounts to an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession of the premises, amounts to a surrender by operation of law. I think that is a very salutary rule." This agreement of course must be followed by acts and conduct shewing an intention of carrying out the agreement.

Here the evidence shewed a clear intention on the part of Sowden and Mrs. Crocker that the former should have the two shops, now the subject of dispute, and should either

occupy or lease them. He had built a much more commodious and expensive house than he had agreed to, and had made additions to it, on the understanding that he was to have these shops. One of them had always been in Sowden's exclusive possession, and the other he claimed was in his possession, though Mrs. Crocker had stored there some articles of furniture, not in use, and there had been a conversation between him and her as to her leasing this shop, and he had agreed to give her the refusal of it.

When the defendant Gott wished to lease the two shops he first applied to her for information as to the party who was authorized to lease them, and she referred him to Sowden. When he applied to Sowden he refused to let the room which Mrs. Crocker had spoken about taking, unless she was willing that it should be let to some other person. On her assent being given, he bargained with Gott for both shops, and afterwards they moved the chips, shavings, &c., as well as the articles belonging to Mrs. Crocker, from one of the shops. On this she expressed her dissatisfaction, and refused to allow Gott to take possession of that shop.

At that time all she claimed was, that Sowden should pay her \$50 for not finishing some part of her premises in time. They both agreed to refer that matter to one of the neighbours, and Sowden offered her the key, and told her to rent the place to Gott, as it would be an injury to him (he having made his arrangements to go into the place), if he could not get it then.

She then consented that Sowden should let the place to Gott, consented that he should give him the key, which was then and there done. Gott took possession, cleaned out, the place, and next day put in some of his goods, and when he was gone for a second load to the railway station, he found that Mrs. Crocker had caused his goods to be put out and the doors locked. On this Mr. Sowden forced open one of the doors, and put Gott in possession, where he remained until the commencement of the action.

Before this, and after Mrs. Crocker had moved to the house, she partitioned off that portion of cellar under the

shops from the rest of the cellar which she used. There was no intercommunication between the shops and the portion of the house she occupied.

All this occurred whilst Mrs. Crocker's husband was in the Penitentiary.

Mrs. Crocker, Mr. Sowden, and Gott, all agreed that these two shops should be taken by Gott, and that the rent should be paid to Sowden. Gott took possession with the consent of Mrs. Crocker and Mr. Sowden, when they were both present, pursuant to that arrangement.

This seems, as to the premises in question, a proceeding very like what Lord Denman refers to in *Nickells v. Atherstone*, 10 Q. B. 944, when he used language to the following effect: "As far as the landlord is concerned, he has created an estate in the new tenant, which he is estopped from disputing with him, and which" (as to the part in dispute) "is inconsistent with the continuance of the first tenant's term. As far as the new tenant is concerned, the same is true. As far as the owner of the particular estate in question is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession" (of the room), "and so enabling the new tenant to enter."

If this be not, technically, a surrender at law, it seems to me that all parties must now be prevented from saying that Sowden had not the right to lease these two rooms to Gott, he having in fact been put in possession of them as tenant, under an agreement made with the sanction of all the parties concerned.

We think the rule should be absolute to enter a nonsuit.

Rule absolute.

LEES V. THE CORPORATION OF THE COUNTY OF CARLETON.

Municipal Act of 1866, sec. 419—County Council—Neglect to provide accommodation for officers of Justice—Right of action therefor—Damages—Receipt of part of claim in full.

A County Attorney and Clerk of the Peace may maintain an action against the Corporation of the County for breach of duty in not providing necessary and proper accommodation for him as such officer, as required by 29-30 Vic. ch. 51, sec. 419, and may recover by way of damages in such action rent paid by him to procure such accommodation.

The Court House in which plaintiff previously had his office was burned, and the County Council informally offered him certain rooms in another building leased by them. The plaintiff considering them insufficient, as in fact they were, hired others at \$11 per month; and having sent in his bill to the Council for 17 months, they passed a resolution to pay him \$93.50 (being one half) in full of his claim, which sum he afterwards received, and signed a receipt, and the check therefor, which purported to be in accordance with the resolution. *Held*, that he was bound by such settlement, and could not recover more in respect of the 17 months rent; but that he might recover the full rent paid by him subsequent to the resolution.

DECLARATION. The common counts.

Second count. That the plaintiff on the 10th January, 1870, and from thence until the 10th of March, 1872, was, and still is, Clerk of the Peace and County Attorney for the County of Carleton, and as such Clerk of the Peace and County Attorney an officer connected with a Court of Justice, to wit, the Court of General Sessions of the Peace in and for the County of Carleton, and had during all the time aforesaid in his said capacity the care and custody of the books, documents, records, and other papers of the said Court, and other books, documents, records, and papers, and was entitled to be supplied and provided by the defendants with all necessary and proper accommodation as such officer as aforesaid, and for the safe and proper care, custody, and preservation of such books, documents, records, and papers, and for enabling the plaintiff as such officer to do, perform, and carry on the duties of his said offices; and it was the duty of the defendants, from time to time during all the time aforesaid, to provide for the plaintiff as such officer as aforesaid all necessary and proper accommodation, and amongst other things a suitable and proper office and office furniture

for the care, preservation, and protection of the said books, documents, records, and papers, and for carrying on and performing the duties of his said offices of Clerk of the Peace and County Attorney, and his duties as such officer connected with such Court of Justice within the County of Carleton. Yet the defendants, disregarding their duty in that respect, did not nor would during all the time aforesaid provide for the plaintiff as such officer a suitable or proper office or office furniture, or any office or furniture whatever, for the care, preservation, and protection of the said books and documents, nor for carrying on or performing the duties of his said office connected with the administration of Justice within the said county, although often requested so to do, but wholly neglected and refused so to do, and therein failed and made default; whereby the plaintiff was during all the time aforesaid put to great trouble and inconvenience and expense, and was compelled to lay out and expend divers large sums of money in providing such office, office furniture, and other necessary and proper accommodation, during all the time aforesaid, for himself, as such Clerk of the Peace and County Attorney and Officer of such Court of Justice. The plaintiff claimed \$400.

Pleas, 1. To first count. Never indebted.

2. To same count. Payment.

3. To same count, as to \$187, parcel &c., for office rent and care of office, which was unliquidated, that defendants disputed said supposed debt and denied their liability, and to terminate the dispute and plaintiff's claim in respect of the said sum of \$187, plaintiff and defendants agreed that the demand of plaintiff herein pleaded to should be settled by defendants paying him the sum of \$93.50 in full satisfaction of the claim herein pleaded to, and defendants in pursuance of the agreement paid plaintiff \$93.50, which he accepted in full satisfaction of the claim herein pleaded to.

4. To second count. Not guilty.

5. To second count, that defendants did from time to time and at all times provide all necessary and proper accommodation for plaintiff as such officer connected with the Courts of Justice as aforesaid.

6. To the second count. That they provided proper accommodation for him as such officer as aforesaid, and notified him that such accommodation was at his disposal, but he neglected and refused to avail himself of it.

7. To the second count. As to so much of plaintiff's claim for damages for not being provided with proper accommodation from 2nd. January, 1870, to 9th June, 1871, accord and satisfaction by paying plaintiff \$93.50, which was paid to and accepted by plaintiff in satisfaction and discharge of plaintiff's claim herein pleaded to.

The plaintiff joined issue on all the pleas.

The case was tried at the last Fall Assizes, at Ottawa, before Gwynne, J., without a jury.

It was admitted that the plaintiff was Clerk of the Peace and County Attorney for the County of Carleton, and had an office in the public buildings of the County, which were destroyed by fire on the 9th or 10th of January, 1870.

After the fire the Warden of the County rented some buildings called Baldwin's buildings, in which the offices of the County Treasurer and Sheriff were held. In this building there was a small room in rear of the Treasurer's office, which was said to be quite unfit for the office of the Clerk of the Peace and County Attorney, and there were rooms in the third story of the building which were said to be not readily accessible, but which were of sufficient capacity for the plaintiff's office. It was suggested that there might be some difficulty in getting a safe up to those rooms.

The plaintiff practised as a lawyer and had a law partner. The office of the law firm had been in the County Attorney's office before the fire, and the name of Lees & Gemmill was placed on or near the door of the premises which the County Attorney occupied after the fire, but the words County Attorney were also placed there.

The plaintiff engaged these rooms by the month, and agreed to pay \$10 a month for the rooms, and \$1 a month for taking care of the same.

The plaintiff first sent in an account to the defendants in January, 1871, charging them with the amount paid for

twelve months' rent, at \$10 per month, \$120, and \$1 per month for a care taker, making together \$132.

The Council took no notice of the application, and in June, 1871, he sent in another account, charging for amount of account rendered \$132, and five months rent and care of office to 4th June, \$55, making \$187.

He attended the meeting of the Council, and was heard on the subject of his claim.

It was moved and seconded, "That the account of Robert Lees, Esquire, be submitted to the Gaol and Building Committee, and that the clerk notify R. Lees, Esquire, that there are rooms for his occupation in the building occupied by this Council, and that Lees be again notified." This resolution was lost.

It was then moved, that one half of the claim of Mr. Lees be liquidated by the Council in full of his claim for office rent, and that from this date he be furnished with an office in Baldwin's Block, in lieu of rent in future.

A book of the corporation was produced, in which was entered as follows :—

"No. 265.

Ottawa, June 24th, 1871.

"Favour of R. Lees, Esquire, C. A., for \$93.50, in accordance with resolution of Council, June Sessions, 1871. Received the Warden's order on the Treasurer for the above amount.

(Signed) "ROBERT LEES, C. A. & C. P."

An order was produced, partly written and partly printed, as follows :—

"Corporation of the County of Carleton,

"No. 265.

Ottawa, June 24th, 1871.

\$93.50.

"Pay to R. Lees, Esq., Co. Attorney, ninety-three dollars and fifty cents, in accordance with resolution of Council, June Sessions, 1871.

"(Signed) JAS. MORGAN, Warden.

"Certified and entered, WM. COWAN, County Clerk.

"To J. Wilson, Esq.,

"Treasurer of the County of Carleton."

(Across the face of this was written "Robert Lees.")

The plaintiff said he was not aware the resolution was in full of his claim, if so he would not have accepted it. He said, "I supposed at the time I heard they had ordered \$93.50, that the Council intended to put me off with that amount if they could."

The Warden and Clèrk of the Council both stated that the plaintiff was present when the resolution of the Council was passed, and it was passed immediately after he had addressed the Council on the subject of his claim.

The Clerk said he did not consider it his duty to send to the plaintiff a copy of the resolution, as he was present when it was passed. The Clerk said he understood the plaintiff when he took the money to intend to convey the meaning that his claim would hold good from that time forward.

The Treasurer was called in reply, and stated that when Mr. Lees took the money from him, he said this was only a part, or one part of his claim.

At the close of the plaintiff's case, a nonsuit was moved for, on the grounds :

1. That an action will not lie at the suit of a public officer of this nature ; he should apply by mandamus.

2. There was no demand made by the plaintiff on the corporation to supply him with necessary accommodation, nor refusal by them.

3. No action lies on the common counts. There is no evidence of an express or implied assumpsit.

The plaintiff contended the first objection could not be raised now, in face of the form of the declaration and the issues thereon : that as to the second objection, the matter should have been pleaded ; and as to the action not lying on the common counts that the part payment was an answer to this objection.

The learned Judge found the balance as claimed for the plaintiff \$192.50, subject to the objections taken for defendants, and reserved leave if necessary.

In answer to an objection as to amount, the learned Judge said, " If the Court thinks the action lies, the question of amount will be before them also."

He found on the ground that the accommodation Mr. Lees provided was not in excess of what was necessary in his public capacity. There was a good deal of evidence that Mr. Lees had not formally notified the Council that he required an office, and that he had not notified them that what was said to be the accommodation provided for him in the Baldwin buildings was not proper for his office; and that he, Mr. Lees, was not formally notified that they had provided rooms in the Baldwin buildings for his office, and that the particular rooms that were set apart for him had not been notified to him.

In Michaelmas Term, *S. Richards*, Q. C., obtained a rule *nisi* to enter a nonsuit, on the ground that the verdict was against law and evidence in this, that there was no legal liability on the part of the defendants to the plaintiff to provide him with an office or office accommodation, or no such liability as could be made the ground of an action against the defendants; that if there was any liability, it could only be enforced by mandamus and that the evidence disclosed that the defendants did furnish sufficient office or office accommodation: that no sufficient evidence was given to sustain the common counts: that the payment made was in satisfaction of the plaintiff's claim, and that on the evidence the plaintiff did not make out a right to recover in this action; or why the amount of the verdict should not be reduced \$49.50, or to the sum of \$99, or such other sum as the Court might direct, on the ground that the plaintiff and his co-partner also occupied the premises, in respect of the rent of which he claims in this cause for their own private business, and in equity and fairness should defray a portion of the rent, and should contribute one-half thereof; and also on the ground that the payment of \$93.50 was in satisfaction of the plaintiff's claim for the seventeen months, up to the 10th June, 1871; or why the judgment in this case should not be arrested, on the ground that the verdict is general on all the counts, and that the last count does not disclose a legal cause of

action; that there is no such duty on the defendants as alleged, and none which would enable the plaintiff to maintain an action at law for a breach thereof.

During this Term *C. S. Patterson*, Q. C., shewed cause. No rooms were appropriated to the plaintiff by the Council by resolution. Those officers who after the fire got rooms, got them by direct communication with members of the Council. It was all managed by conversations, and there was nothing to bind the plaintiff. The evidence shewed the rooms were not suitable for an office. They were not secure. A fire-proof safe could not be got up the stairs. [RICHARDS, C. J.—It is not shewn either that the plaintiff needed one, or that he had an iron safe.] Sec. 419 of the Municipal Act of 1866, declares that the Council shall “from time to time provide all necessary and proper accommodation for the Courts of Justice other than the Division Courts, and for all officers connected with such Courts.” The nature of his office would make a safe a part of the proper accommodation referred to. He is *custos rotulorum*. [RICHARDS, C. J.—Could he not have discharged himself of responsibility for any damage to his papers by saying to the Council “You have not furnished me with accommodation.” As to convenience, at such a time every one is inconvenienced.] The finding of the Judge was in effect that there was not sufficient accommodation, and the evidence shewed there was not in fact necessary and proper accommodation. He referred to *Henley v. The Mayor and Burgesses of Lyme Regis*, 5 Bing. 91; S. C. 3 B. & Ad. 77, 2 Cl. & Fin. 331; *The Company of Proprietors of the Lancaster Canal Co. v. Parnaby et al.*, 11 A. & E. 223; *Reeves v. Corporation of the City of Toronto*, 21 U. C. R. 157; *Harrold v. Corporation of the County of Simcoe*, and *the Corporation of the County of Ontario*, 16 C. P. 43.

S. Richards, Q. C., contra. If the defendant has any remedy against the Council for not furnishing the accommodation required by sec. 419 of the Municipal Act of 1866, the remedy is by *mandamus*, not by action: *Dark v. The Municipal Council of Huron and Bruce*, 7 C. P.

378 : *Couch v. Steel*, 3 E. & B. 402 ; *Hawkinshaw v. The District Council of the District of Dalhousie*, 7 U. C. R. 590. The plaintiff was a practising attorney, carrying on his business in the same office, and therefore ought in fairness only to be repaid a portion of the rent. The question of inconvenience cannot be discussed. He never asked for any better rooms. As to the \$93 paid to him, he accepted that in full of the seventeen months claim. It was strange, if he did not so understand and accept it, that he did not remark upon his getting exactly half of his claim. His receipt, however, read with the resolution of Council, puts that beyond doubt.

RICHARDS, C. J., delivered the judgment of the Court.

In *Couch v. Steel*, 3 E. & B. 402, Lord Campbell refers to *Com. Dig.* : "Action on the case," A, as authority for the general rule, "Where a man has a temporal loss, or damage by the wrong of another, he may have an action on the case, to be repaid in damages."

So in *Com. Dig.*, "Action upon the case for negligence," A 3, it is laid down under the head, "For a neglect in doing that which by law he ought to do," "So it lies against him who neglects to do that which by law he ought to do : as if a man is bound by prescription to pay toll, and refuses the payment. R. 1. *Rol*, 103. l. ult., 106. l. 37. *Dub.* 3 *Lev.* 400. Or, to provide beer for the beadle of the hundred, and does not do it."

Reference is there also made to a liability thrown on a defendant, where many of the inhabitants of a parish were interested, when the action could be maintained by any individual claiming loss ; such as *Maples v. Bassett*, 4 *Mod.* 241 ; *Gidding v. Fay*, *Cro. Eliz.* 569 ; 1 *Rol.* 109 l. 20, *Mo.* 355. Many of the older cases are cited under the A. 2.

In *Henley v. Mayor and Burgesses of Lyme Regis*, in appeal, 3 B. & Ad. 77, 86, as well as in the same case, 5 *Bing.* 91, many of the older cases referred to in *Comyn's Digest* were cited, and the *Digest* itself, under the head of "Action on the case for Negligence," A 2, A 3.

In that case it was held that the defendants were liable to indictment for the non-repair of the banks, sea shore, and mounds, between the borough and the sea, and that the plaintiff could maintain an action against them for direct and particular damage sustained by him in consequence of their neglect.

The doctrine laid down in that case has been followed generally by all the Courts since, viz., that when the facts shew that the defendants were bound by law to discharge a certain duty, the failure to perform which, or to do it in a proper way, caused an injury to the plaintiff peculiar to him, an action would lie.

Of course, the plaintiff must be one towards whom the defendants were bound to discharge this duty.

Discussion has frequently arisen as to how the duty arises, whether by contract, by prescription, or by Act of Parliament, and whether there is that privity between the party complaining of the neglect of duty and the party who was guilty of the negligence, that would enable the plaintiff to recover, and not unfrequently whether the remedy is not by indictment instead of action.

Many of the cases shew, of course, that when an indictment will lie, say for non-repair of a highway, yet when the plaintiff has suffered a particular injury, beyond and different from the rest of the public, in consequence of an accident arising from such non-repair, his right to recover is now undoubted, when the duty to repair is clearly established against the corporation.

In *Couch v. Steel*, 3 E. & B. 402, it was held, that under the second count of the declaration an action would lie against the owner of a ship who neglected to supply medicine for the use of the ship's company, of which the plaintiff was one; the Statute 7 & 8 Vic., ch. 112, casting the obligation upon the defendant, under the 18th section, of having and keeping constantly on board the ship a sufficient supply of medicines, suitable to accidents and diseases arising on sea voyages. The plaintiff was a seaman engaged on defendant's ship, on a voyage from

England to Aden, and whilst on board the ship he became sick. He averred in his declaration, that in consequence of the defendant's neglect to provide the proper and sufficient supply of medicines suitable to diseases arising in sea voyages, and by reason of such neglect, the plaintiff was unable to be cured of his sickness, and suffered great pain.

Lord Campbell, C. J., in giving judgment, after stating the general rule as to the right of a party to bring an action on the case for a wrong of another, as already quoted, at page 411, proceeded, "The Statute of Westm. 2 (1 Stat. 13 Ed. 1, ch. 50), gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute. See 2nd Inst. 486. And in *Com. Dig.* 'Action upon statute' (F) it is laid down that, 'in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' Therefore the simple enactment requiring the supply of medicines would have entitled the plaintiff to an action, in the same manner as if the obligation had been imposed by the Common Law, or had been expressly included in the ship's articles."

The learned Chief Justice then proceeds to discuss the question whether the plaintiff could recover, inasmuch as by the same statute, sec. 18, the party guilty of a breach of the duty is liable to a penalty to be recovered in an action by an informer. And the Court held he could, because there was "beyond the public wrong a special and particular damage sustained by the plaintiff, by reason of the breach of duty by the defendant."

Now here, by 29 & 30 Vic., ch. 51, sec. 419, it is enacted that, "The County Council shall have the care of the court house, and of all offices and rooms connected therewith, whether the same forms a separate building or is connected with the gaol, and shall have the appointment of the keepers thereof; and shall from time

to time provide all necessary and proper accommodation for the Courts of Justice other than the Division Courts, and for all officers connected with such Courts."

Here there is no doubt the plaintiff was an officer (County Attorney and Clerk of the Peace,) connected with the General Sessions, which is a Court of Justice within the meaning of the statute, and a room for an office was a proper and necessary accommodation, with which he should have been provided by the defendants.

I fail to see how the plaintiff could maintain any other action against the defendants than for the cause of action set out in the second count. There is no contract or agreement between the parties, and the breach of duty only arises under the statute.

The verdict therefore should be for the defendants on all the issues to the first count, except the second plea, which will be for the plaintiff.

It was suggested that the plaintiff's remedy was by mandamus, and that before he could properly make the defendants liable in this action, he should have demanded that the defendants should provide him with an office, and that having failed to shew a demand defendants were not guilty of a breach of duty for which an action would lie; that at all events certain rooms were assigned to the plaintiff by defendants, in a building leased by defendants for the use of the County officers, and that they had fulfilled their duty, plaintiff having had notice of this fact.

The plaintiff, on the contrary, contends that no formal notice was given to him that the rooms were assigned to him, and that if such notice had been given, the rooms referred to did not afford necessary and proper accommodation for him as an officer of the Court, and that he was obliged to take other rooms, and therefore he is entitled to maintain the action.

We think, from the evidence given, there is no reasonable doubt that the plaintiff knew there were unoccupied rooms in the building that had been rented by the defendants for the accommodation of the County officers,

which they were willing and desirous he should occupy for his office, and there is no doubt that they also knew that the plaintiff was desirous of having better rooms than those in that building, and wished the Council to get them for him.

We think also that the evidence shews, that the unoccupied rooms in the building referred to would not have afforded proper accommodation to the plaintiff in relation to the office with which he was connected. And we do not dissent from the views of the learned Judge who tried the cause, that the rooms hired by the plaintiff were not in excess of what were needed in his public capacity.

As to that portion of the plaintiff's claim up to the 9th June, 1871, seventeen months at \$11 a month, \$187, for which an account was presented to the defendants, and which was brought before the Council at the sittings in June, 1871, we think the plaintiff is bound by that settlement. The resolution which was passed at that sitting, immediately after he was heard on the subject of his claim, is express, that the \$93.50 is allowed to him in full of his claim. The receipt which he signed on receiving the cheque or order of the County Treasurer to pay the amount, is for \$93.50, in accordance with the resolution of Council, June sessions; and the check or order on which he received the money, and which he also signed, is to pay him the \$93.50, in accordance with the same resolution.

Mr. Lees in his evidence said he did not know it was in full or he would not have taken it.

The Warden and the County Clerk say he was present when the resolution was passed. His receipt and the cheque or order refer to the resolution, and he says he supposed at the time they meant to put him off with the \$93.50, if they could.

We think the plaintiff ought to be bound by the receipt of this money paid in this way. If he did not intend to receive it as the Council intended, he should not have accepted it. He is a lawyer, and had before him direct notice that there was a resolution of Council. He says he

supposed they intended to put him off with the \$93.50, and as a prudent reasonable man he ought to have seen that he was not doing that which would bind him.

Before opening up a settlement of a matter of this kind, made in this way, we ought to have much clearer evidence that injustice was done.

Here the County have suffered a great loss by the destruction of their court house. Much inconvenience must be suffered by all connected with the administration of justice, who were accustomed to use the building. It would not be reasonable to expect the Municipality to restore a public building of this kind at once. All, therefore, who were concerned in the matter must expect to be put to some inconvenience, more or less.

The plaintiff by the possession of an office which he occupied in the court house, which was furnished to him by the Corporation, was enabled to carry on his private professional business there in connection with his practice. Neither he nor his partner made any allowance to the Corporation for the advantages arising to him or them from their being able thus to carry on the law business there free from rent. There can be no doubt this was an advantage to the plaintiff, and when claiming from the defendants to be indemnified for the loss he sustained by the defendants' breach of duty, it does not seem very strange that the members of the County Council should have thought that the advantages the plaintiff received from having the law office of himself and his partner in the building he had rented for his official office would be equal to half his rent, say \$5.50 a month, and pass an order to pay him on that basis.

And when in defendants' book reference is made to the order on the treasurer in favour of the plaintiff for \$93.50, in accordance with the resolution of Council, and he signs beneath it, "Received the Warden's order on the Treasurer for the above amount," and it is expressed in that very order to be, "in accordance with the resolution of the Council," I do not think we can with propriety

interfere or infer anything in the plaintiff's favor against his own act.

The Clerk of the Council said he understood the plaintiff to say, when he took the money, he understood his claim would hold good from that time forward.

We therefore do not think that we are compelled to limit the plaintiff's right to recover from the 9th June, 1871, up to the 10th March, 1872, to \$5.50 a month, as allowed him by defendants up to that time.

We think, from all the evidence, as already intimated, that the defendants had not in fact provided the necessary and proper accommodation for the plaintiff as required by the statute, and that accommodation was not provided after June, 1871. And, under all the circumstances, we think it would be right to allow him at the rate of \$11 a month for the nine months since the account was settled by the payment of the \$93.50, pursuant to the resolution of the Council. This of course is in the nature of damages sustained by the plaintiff for the breach of duty of which the defendants have been guilty.

We therefore think there should be a verdict for the defendants on the seventh plea to the second count, which covers the damages up to 9th June, 1871, and for the plaintiff on the other issues to that count; and that a verdict should be entered for the plaintiff on the second count for \$102. The interest on the amount of the rent from March to the time of the verdict would be over the \$3 additional, and the sum added will remove all doubts as to the plaintiff's right to recover County Court costs, which we think the learned Judge who tried the cause would have certified for, and which we think would be reasonable in a difficult and important action like this.

Rule accordingly.

WILLIAMS V. McDONALD.

*Ejectment—Statutes of Limitations—Occasional visits by true owner—
Acknowledgment of title—Tenancy at will.*

Ejectment for three acres and one acre, separate parcels of lot 36 in the 2nd concession of Lochiel. On the 16th of June, 1839, C. McD., mother of the plaintiff, became owner of the whole lot by conveyance from the grantee of the crown.

On the 6th of April, 1847, she conveyed the whole lot to J. N. W., her son, by a deed which was to be given to him when he should give security for her support. This he did by bond, and the deed to him was registered on the 20th April, 1857.

On the 16th April, 1849, however, she conveyed to the plaintiff, another son, the three acre parcel, by a deed registered 2nd October, 1849.

On the 10th June, 1851, J. N. W. conveyed the one acre parcel to plaintiff.

On the 17th May, 1862, J. N. W. gave a mortgage on the lot to plaintiff registered 23rd September, 1862, to secure advances made by plaintiff to pay off a previous mortgage to defendant, which mortgage to plaintiff contained a reservation "of four acres already made by deeds of conveyance to the party of the third part (plaintiff) from C. McD. and J. N. W. This mortgage was discharged before this suit was commenced.

On the 28th December, 1868, J. N. W. conveyed the whole lot to defendant, without any reservation of the three or one acre parcels.

J. N. W. lived on the lot and used it as owner from the date of the conveyance to him in 1847 till he sold it in 1868. The plaintiff went to the U. S. in 1849, but came back yearly and stayed on the lot, where his mother also lived with J. N. W. In his evidence, J. N. W. said he always considered the four acres to be his brother's, and did not hold them adversely, but made no difference in working them.

Held, as to the three acre parcel, that the plaintiff was barred by the Statute of Limitations, notwithstanding his annual visits to the land.

Held, also, *Wilson*, J. dissenting, that the reservation in the mortgage to the plaintiff by the defendant, dated 17th May, 1862, was not an acknowledgment of the plaintiff's title at that time to the lands so reserved.

Held, also, as to the one acre conveyed to plaintiff by J. N. W. on 10th June, 1851, that J. N. W. being allowed to remain in possession was a tenant at will, which tenancy ended on the 10th June, 1852, and the action having been commenced on the 14th June, 1871, the plaintiff was not barred.

Per *Wilson*, J., taking the words in connection with the transactions between the parties, the one conveying and the other receiving the mortgaged land, the reservation in the mortgage of the 17th May, 1862, was an express and unequivocal declaration in writing that the plaintiff's title to the four acres was valid and subsisting at that time.

EJECTMENT (summons issued on the 14th June, 1871,) for part of lot thirty-six in the second concession of the township of Lochiel, containing by admeasurement three acres, commencing at a post on the north side of the road leading from the village of Alexandria, at the division line

between 36 and 37 ; then north along the line about three acres to the centre of the river Garry ; then eastwardly in a concession line direction one acre to a post ; then south twenty-four degrees east to a post on the north side of said road leading to the village of Alexandria ; then westwardly along said road one acre to the place of beginning. And secondly, part of the said lot thirty-six, containing by admeasurement one statute acre, butted and bounded as follows : commencing on the road near the middle of lot thirty-six, and leading from Alexandria eastward, at a point distant one acre from the west line of the said lot ; then east one half an acre parallel with the front line ; then north two acres parallel with the side line of the said lot : then west one half an acre ; then south two acres to the place of beginning.

Defence for the whole.

The plaintiff, in his notice, claimed title to the lands firstly mentioned by virtue of a deed of conveyance from Catharine McDonald, who was the assignee of the patentee from the Crown of the said lands ; and to the lands secondly mentioned under a conveyance thereof from John N. Williams, who held by conveyance from Catharine McDonald, assignee of the patentee of the Crown.

The defendant claimed title by virtue of a conveyance of the whole of the land mentioned by deed from John N. Williams, and also by length of possession in himself, and in the persons under whom he claimed.

The cause was tried at the last Spring Assizes at Cornwall before Morrison, J., without a jury.

It appeared from the evidence that Catharine McDonald, the mother of John N. Williams and the plaintiff, became the owner of the west half of lot thirty-six, in the second concession of Lochiel, 100 acres, by conveyance from the grantee of the Crown, dated 16th June, 1839, which conveyance was duly registered in the registry office of the County of Glengarry on the 5th July, 1839.

Catharine resided on the lot with her son John N. Williams.

On the 6th April, 1847, she executed a conveyance of the whole hundred acres to him, by the name of John Williams. This conveyance was deposited with one Alick McDonald, until John N. Williams should give security to his mother to maintain her. A bond for the purpose appeared to have been given, and John N. Williams obtained the deed and had it registered in the registry office, on the 20th April, 1857.

Before this, however, on the 16th of April, 1849, Catharine McDonald, in consideration of £3, conveyed to her son Angus Williams, the present plaintiff, the three acres of land first described in the writ of summons in this cause. That deed was registered the 2nd October, 1849.

On the 10th of June, 1851, John N. Williams, in consideration of £20, conveyed to the plaintiff the statute acre of land, secondly described in the summons. This conveyance was registered on 10th June, 1851.

John N. Williams occupied the place for over thirty years, until he conveyed to the plaintiff. There seemed to be no doubt, that from the time of the execution of the deed from his mother to him in April 1847, he was the person who was the occupier of the whole of the lot. His mother lived with him. He said he continued in possession of the whole as before, though he considered his brother, the plaintiff, owned the four acres, but he never took possession of it. He said he never held the four acres as his own.

He built a new house on the other side of the river, and removed the old house off the three acres. He did not consult the plaintiff about it, but plaintiff told him he was wrong in doing it.

Angus left that part of the country in 1849, but was there frequently, once a year, and stopped the first and second time of his return at the old homestead. It was removed in 1852; he was aware it was to be taken down.

Angus stated, he told John he might take it down: he consented to it. He said, when he visited the place he would go down and look at the property. He also said he let it to his brother, who agreed to pay the rent and taxes for it. John, however, did not confirm that statement.

Previous to 1862, John mortgaged the premises to the defendant, and on being pressed for payment, borrowed money from the plaintiff to pay it, and gave him a mortgage, on the 17th May, 1862, on the west half of 36, in the 2nd concession of Lochiel, to secure the payment of £170 2s.

Under the mortgage he granted to the plaintiff the west half of lot 36 in the 2nd concession of the aforesaid township of Lochiel, containing 100 acres more or less, with the reservation of four acres already made by deeds of conveyance to the said party of the third part, (Angus Williams, the plaintiff,) from Catharine McDonald and John N. Williams, which said deeds are recorded in the registry office of the said County of Glengarry. At the end of the *habendum* was the proviso, subject nevertheless to the reservations, limitations, conditions, &c., expressed in the original grant from the Crown; and also a reservation of nine acres off of the south-east corner of said lot, deeded by John N. Williams to Angus Williams, and by Angus Williams deeded to Margery Williams. There was also a proviso for the defeasance on payment of the mortgage money and interest.

This mortgage was registered on the 23rd September, 1862, and had since been paid, and was discharged before the commencement of this suit.

On the 28th December, 1868, in consideration of \$2000, John N. Williams, and his wife Margery joining to release her dower, conveyed to the defendant in fee the west half of lot 36 in the second concession of Lochiel, including any portion of the said west half which might be under lease at the date of the deed, but excepting therefrom nine acres of the south-east corner, which had been that day conveyed by John N. Williams and his wife to defendant by deed.

At the time of this conveyance John N. Williams was in possession of the whole 100 acres, as he had been before, and continued in possession for about a year, and then gave up possession to the defendant, who was in possession at the time of the trial.

The defendant said he was aware of the conveyance of the pieces of land in dispute to the plaintiff, and did not wish to buy the place, as these three acres were off the front, but on speaking to John about it, he had said there was some trick about Angus getting the deed for the three acres.

The plaintiff, in his evidence said he had been absent from 1849, and still lived out of the Province.

He added : " John occupying the place, holding it from me, when I got the deed I told him he might have the use of it until I wanted it ; he was to pay the taxes. I got three acres from my mother in 1849. I did not go on it."

He afterwards proved the purchase of the one acre, and said, " I arranged with my brother that he should have charge of it, he paying the taxes."

It seemed not quite certain whether he referred to the one acre, to the three acres, or to the whole four acres.

John N. Williams said he heard his brother had got the deed of the land from his mother. He said, " I still kept possession of it, notwithstanding the deed : he never took possession of it. I considered it to be his property ; but I used it. At the time I sold to defendant I was aware the plaintiff was the owner of the two parcels. I considered him the owner of the four acres. I never held the four acres as my own. I am not aware of any understanding that I was to pay the taxes on these four acres. I was not holding these four acres adverse to my brother."

At the close of the plaintiff's case, defendant's counsel objected that the plaintiff could not succeed : that Catharine conveyed away the land in 1847, more than twenty years ago : that defendant's vendor continued in possession ever since, until he sold the land to defendant, who went into possession, and had been in possession ever since : that the giving the mortgage was not giving up possession of any part of the lot, of which he all the time was in actual possession : that the plaintiff was aware, prior to getting the deed from Catharine, that she had conveyed to John N. Williams, who was then in possession, and having such notice his deed gave him no title against defendant.

For the plaintiff it was contended, that as to the one acre, he must succeed, (in this view the learned Judge concurred) : that as to the three acres, the title was proved to be in the plaintiff, no possession running in this case against the plaintiff: that the holding by John N. was for the plaintiff, and the mortgage given by defendant's vendor was evidence against the defendant, as he recognised the plaintiff's title.

At the end of the case the defendant's counsel renewed the objection made at the close of the plaintiff's case, and further contended that the twenty year's possession ran against the plaintiff as to all the four acres. The deed for the one acre was made on the 10th June, 1851, whilst this action was commenced on 14th June, 1871, twenty years having elapsed.

The learned Judge found that Catharine McDonald owned in fee, and conveyed the whole of the half lot to John Williams on the 6th April, 1847, which deed was not registered until the 20th April, 1857: that on the 16th April, 1849, she conveyed to Angus Williams, the plaintiff, three acres, part of the same lot, which deed was registered on the 2nd of October, 1849: that John Williams conveyed to the plaintiff by deed dated 10th June, 1851, one acre of the lot, which deed was registered on the same day.

He also found that John executed the mortgage to the plaintiff, dated 17th May, 1862, excepting the four acres, which mortgage was discharged on the 28th December, 1868.

He also found the conveyance to defendant from John Williams, excepting the nine acres as already mentioned.

He concluded: "At present I shall find for the plaintiff, as to the one acre conveyed to plaintiff by deed of 10th of June, and I reserve leave to defendant to move to enter a verdict for him, if the Court should be of opinion on all the evidence I should have entered a verdict for defendant."

In Easter Term last *S. Richards*, Q. C., obtained a rule *nisi* to enter a verdict for the defendant, on the ground that the verdict was against law and evidence, in this, that the

defendant was entitled to succeed on the defence of length of possession, or Statute of Limitations, and under the deed from John N. Williams to the defendant, and that upon the evidence the plaintiff was not entitled to recover.

This rule was enlarged until Michaelmas Term last, when *J. K. Kerr* shewed cause. John having agreed to take care of the place for Angus, and his mother being in possession, and Angus visiting the place from year to year, the statute would not run against Angus. The defendant bought subject to the previous deeds of which he had knowledge; *Doe Irvine v. Webster*, 2 U. C. R. 224; *Maclean v. Laidlaw*, *Ib.* 222; *Boulter v. Hamilton*, 15 C. P. 125; *Henderson v. Harris et al.* 30 U. C. R. 360; *Butler and Baker's Case*, 3 Rep. 25; *Shep. Touch.* 9. As to the mother's right to convey, that is clear, as she had not in fact delivered the deed to John N. Williams before she conveyed the three acres to plaintiff: *Doe dem Garbons v. Knight*, 5 B. & C. 671; *Co. Litt.* 36 a; *Broom's Com.* vol. ii, 492; *Davis v. Jones et al.* 17 C. B. 625, 634; *Murray v. Earl of Stair*, 2 B. & C. 82; *Bowker et al. v. Burdekin*, 11 M. & W. 128; *Nash v. Flynn*, 6 Ir. Eq. R. 567; *Christie et al. v. Winnington*, 8 Ex. 287, 290. The Court will not go far towards presuming adverse possession especially among relatives: *Cottrell v. Watkins*, 1 Beav. 365; *Doe Taylor v. Proudfoot*, 9 U. C. R. 503; *Doe Cuthbertson v. McGillis*, 2 C. P. 124; *Hemingway v. Hemingway*, 11 U. C. R. 240; *Young v. Elliott*, 25 U. C. R. 334; *Orr v. Orr*, 31 U. C. R. 13. As to the tenancy at will: *Doe d. Groves v. Groves*, 10 Q. B. 491; *Foster v. Emerson*, 5 Grant 143; *Randall v. Stevens et al.* 2 E. & B. 641; *Darby* on the Statutes of Limitations 264, 265; *Allen v. England*, 3 F. & F. 49, and the observations of Erle, J., at p. 52; *Doe dem. Hull v. Wood*, 14 M. & W. 682, 687; *Rex v. Collett*, Russ. & Ry. 498; *Woodfall*, L. & T. 10th ed. 183, 284; *Asher et ux v. Whitlock*, L. R. 1 Q. B. 1; *Stephen v. Simpson*, 12 Grant 493; S. C. in App. 15 Grant 594.

S. Richards, Q. C., contra. The parties under whom defendant claims have lived on the place over thirty years.

Catharine McDonald executed the conveyance on 6th April, 1847. It does not distinctly appear when John N. Williams gave the bond to support his mother. If the deed had been delivered as an escrow when the bond was given and the deed handed to John, it would have relation back to the time of its original delivery. Angus left in 1849. There was no consideration for the deed from Catharine McDonald to Angus. As to delivery of a deed: *Preston* on Abstracts, vol. iii., p. 65; *Shep. Touch.* 59; *Bythewood's* Conveyancing, 3rd ed. vol. iii., p. 31; *Washburn* on Real Property, 2nd ed. vol. ii., p. 614; *Cruise's* Digest, vol. IV., p. 30, cap. 2, Deed; *Hooper et al. v. Ramsbottom*, 6 Taunt. 12; *Doe dem Cronk v. Smith*, 7 U. C. R. 376. As to the three acres. Angus could not make out a title. If both were gifts, the deed to John being first in point of time is to be preferred. The defence of the statute as to the three acres is conclusive. John or his mother were in actual possession. Angus was not in possession. A mere coming to the place to see his mother was not a termination of the tenancy at will; something must be done that would make him a trespasser: *Brown* on Limitations, 1869, 471, 472; *Lapierre v. McIntosh*, 9 A. & E. 857; *Randall v. Stevens*, 2 E. & B. 641. As to the termination of a tenancy at will: *Butterfield et ux. v. Mabee et al.* 21 C. P. 234. The conveyance of the three acres being made in 1849 the holding would be reckoned from 1850, and the twenty years would have clearly expired before the commencement of the suit.

As to the one acre; the deed was executed on the 10th June, 1851. If the tenancy is not considered to be one at will, then the twenty years expired before the bringing of the action. If the time is not to be reckoned until a year from the date of the deed, then the twenty years have not expired: Consol. Stat. U. C. ch. 88, sec. 2, sub-sec. 3.

RICHARDS, C. J.—It is not necessary that we should embarrass ourselves in discussing whether the deed from Catharine McDonald to John N. Williams, when originally

executed, was an escrow or not; or if it was, whether the security being given which was required to make it effective as a deed would make it operate at its date, so as to give John N. Williams and those who claimed under him priority over a deed of subsequent date and execution which was not for a valuable consideration.

The view we take of the law applicable to this case, so far as affects the deed of the three acres by Catharine McDonald to the plaintiff, is such that whatever rights he may have had, have been barred by the statute.

It was contended in argument, and authorities were cited to shew, that because the plaintiff was in the habit of coming to visit his mother, who resided with John N. on the lot in question, he was therefore very often on some part of the three acres in question, and every time he stepped on any part of those three acres the tenancy at will which existed between him and John N. was terminated, and the statute would only begin to run from the last time he was so on the piece of land in question, and that was within twenty years of the bringing of this action.

The language of Chief Justice Erle in *Allen v. England*, 3 F. & F. 49, at *Nisi Prius* was referred to. There the occupation of the plaintiff began with the permission of the defendant, who came from time to time to see the plaintiff, and went on the land with him, told him what trees to lop, and what repairs were required. The Chief Justice told the jury if they believed that evidence, they should find for the defendant. The learned Judge observed, at p. 52, "It may be taken that the plaintiff had had the beneficial occupation for more than twenty years, and if that will give him a title I will give him leave to move; but, in my judgment, every time the defendant put his foot on the land, it was so far in his possession, that the statute would begin to run from the time when he was last on it." The jury found for the defendant, and the plaintiff had leave to move. This he did without effect. The case does not appear to have been reported on the motion.

In *Randall v. Stevens*, 2 E. & B. 641, the facts were, that in 1818 the overseers of the parish put the plaintiff into possession of a cottage as a parish pauper. He continued in possession without paying rent until 1839. The overseers took proceedings to get possession before he could set up a claim to it under the Statute. They entered upon it, turned out him and his family, and removed nearly the whole of his furniture and goods. Shortly after, on the same day, he resumed possession of the cottage. There was evidence that he agreed to pay a weekly acknowledgment, but the jury found that he neither then nor afterwards became a weekly tenant, or tenant at will, to the overseers. He continued in possession until the 24th July, 1852, when the overseers entered, and he refusing to deliver up the cottage, they destroyed it. For this trespass the action was brought. The Court held there was an actual termination of the tenancy by the act of the overseers in 1839, when they took possession, and the right of entry accrued to them, under which they entered, as they lawfully might, in July, 1852.

In discussing the effect of the entry in 1839, Lord Campbell said: "An attempt was made to do away with the effect of what then happened by resorting to section 10 of the statute, which enacts, 'that no person shall be deemed to have been in possession of any land within the meaning of this Act *merely* by reason of having made an entry thereon.' But this evidently applies to a *mere entry*, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time, and pronouncing a few words, without any attempt or intention or wish to take possession. In the present case possession was actually taken by the overseers *animo possidendi*; and whether possession was retained by them an hour or a week must for this purpose be immaterial."

In *Turner v. Doe d. Bennett*, 9 M. & W. 643, the lessor of the plaintiff, being seised in fee of the farm, let defendant, his brother-in-law, into possession as a tenant at will in 1817. He remained in possession until the action

was brought, but never paid any rent. In 1820, the parish authorities wished to cut a drain through the farm, and applied to the defendant for leave. He was unwilling it should be done; they then applied to the plaintiff for leave, which he gave, and it was done. In 1823, 1825, and 1827, stones were dug at a quarry on the farm by order of the lessor of the plaintiff. Ejectment was brought in 1840. The Court held, as the jury found that a new tenancy at will had been created after 1820 the action was well brought in 1840. Lord Denman, C. J., in giving judgment in the Exchequer Chamber said, "The intent of an entry is undoubtedly in many cases important, but in the case of a tenancy at will, whatever be the intent of the landlord, if he do any act upon the land, for which he would otherwise be liable to an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be a lawful and not a wrongful act."

In *Doe Groves v. Groves*, 10 Q. B. 486, the facts were, that one John Hart, on the death of his father in 1798, was entitled as heir-at-law to the premises in dispute. He was then fourteen years old. He resided with his mother on the premises until 1805. Defendant had married Hart's mother in 1798. John Hart left in 1805. Between 1805 and 1841 he occasionally resided for two or three weeks at a time in the dwelling house occupied by defendant and his wife as part of their family, and he so resided at his mother's death in 1841, and for three weeks afterwards. In 1842 he executed a mortgage of the premises to the plaintiff at the request of the defendant, the solicitor for the plaintiff saying that it was not good without his concurrence, and the money received was paid to the defendant with the son's assent. The defendant remained in possession, and on ejectment by the mortgagee in 1846 it was held that the title of the mortgagee was good.

In *Locke v. Matthews*, 13 C. B. N. S. 753, the facts were as follows: In 1830 about six acres of waste land belonging to one Beadon, lord of the manor, was enclosed by plaintiff's father, who built a cottage thereon and continued in

possession until 1845, without interruption and without paying any rent. In 1840 Lord Ashburton purchased Beadon's interest in the manor, and in 1845 one Reeves, Lord Ashburton's Steward, came to Locke's cottage, telling him that he must give up the land, and that it had become Lord Ashburton's property. Old Locke thereupon said that the late owner had given it to him for his life, and that it was very hard that he should be turned out. Shortly afterwards, Reeves went again to the cottage and served Locke with a declaration and notice in ejectment. Locke was at this time confined to his bed; and when he got better he called on Reeves, and obtained his consent (on the part of Lord Ashburton,) that he, Locke, and his wife should retain possession of the cottage and two acres of the land for their respective lives. Nothing further was done until 1861, when, Locke and his wife being both dead, the land in question was added to one of Lord Ashburton's farms in the occupation of the defendant. The defendant contended that what passed between Locke and Reeves, Lord Ashburton's steward, in 1845, amounted to a determination in law of the existing tenancy at will, and a creation of a new tenancy at will, and consequently the twenty years were to be reckoned from that time. After a review of the authorities, on discussion of the matter by counsel, the Court held the defendant entitled to succeed. Erle, C.J., said in his judgment, at p. 761, "In ordinary cases an estate at will is effectually put an end to by a clear expression of the determination of the will: *but this Statute requires some more decided act on the part of the owner of the land,* to prevent the acquisition of a title by one who remains in possession. It appears to me, however, that a great deal more was done here than a mere expression of an intention to determine the will. The tenant is told that he must go out; and the owner of the fee simple enters by his agent, and serves the tenant with a declaration in ejectment, indicating in clear and unmistakable terms that he must give up the land, and doing that which would amount to a trespass if there were any existing legal estate

in the tenant. In another part of his judgment he says, p. 763, "The statute has, no doubt, been careful to prevent persons who have enjoyed a long uninterrupted possession of lands from being turned out upon frivolous pretexts." He then cites the 10th section of the statute, and refers to the observations already quoted from *Randall v. Stevens* as to that section applying to a *mere entry*. In conclusion, he says, at p. 764, "If the owner enter effectively, and create a new tenancy at will, he has twenty-one years from that period before he can forfeit his estate."

Mr. Justice Willes comments generally on the views of Chief Justice Erle, and concludes, at p. 767: "It appears to me, however, that that which took place here created a new tenancy at will. The owner of the fee entered upon the land for the purpose of taking possession of it and turning out the tenant at will. At the intercession of the tenant he was allowed to retain a part of the land, and as to that part, with his consent a new tenancy at will was created. It would operate gross injustice if the period of limitation under the statute were not held to run from the time when that entry took place."

Locke v. Matthews is later in point of time than *Allen v. England*, and seems to imply that something more is needed to put an end to a tenancy at will than merely putting one's foot on the land.

In *Day v. Day*, L. R. 3 P.C. at p. 763, on appeal from New South Wales under a similar statute, Sir Joseph Napier, in giving the judgment of the Judicial Committee of the Privy Council, cites the following language of Chief Justice Erle, in *Locke v. Matthews*: "If the owner enter effectively and create a new tenancy at will, he has twenty-one years from that period before he can forfeit his estate." He then proceeds, "The language and policy of the statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will." In the same

judgment of the Judicial Committee of the Privy Council, at p. 761, this language is used : "When the statute has once begun to run it would seem on principle that it should not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property or by receiving rent from the person in the occupation, or by making a new lease to such person which is accepted by him ; and it is not material whether it is a lease for a term of years, from year to year, or at will."

In *Hogan v. Hand*,¹⁴ Moore P.C. 310, before the Judicial Committee of the Privy Council in March, 1861, on another appeal from New South Wales, the question of the termination of tenancy at will came up, the decision of which is not important in disposing of this case, but the doctrines laid down there do not seem to accord with some of the later decided cases.

We were pressed with another question as to this occupation—that John N. Williams was in fact a tenant who paid rent in the shape of looking after the place, and paying the taxes, and that the agreement between him and the plaintiff was that he should pay the taxes for the use of the place. John did not confirm this statement, and I do not understand that the learned Judge was of opinion that such an agreement really existed, if such an agreement would have made any difference. *Primâ facie* John, as the occupant of the land, was bound to pay the taxes. There is nothing to shew that on the assessment rolls he was placed as a tenant and plaintiff as the owner for any part of it, or that any part was assessed in his name for which he would have been liable.

We are not satisfied from the evidence there was any agreement on John N. Williams's part to pay the taxes as rent, for the four acres or any part of it.

We were also pressed with the argument that in the mortgage by John N. and his wife to the plaintiff, dated the 17th May, 1862, there is a recognition of plaintiff's owner-

ship of the four acres, and that being in writing, under seal is a sufficient acknowledgment under the statute, to bar the right which John N. might acquire by virtue of his previous possession.

The effect of what is said in that mortgage about the four acres, as I understand the matter, is, to reserve out of the mortgage four acres of land, and by way of describing that land it is mentioned as the land which before that had been conveyed to the plaintiff in deeds from Catharine McDonald and John N. Williams.

This is simply referred to, as I understand it, as a matter of description. It is no acknowledgment that he was then the owner of these four acres. At most it seems to me to be an acknowledgment that Catharine McDonald and John N. Williams had executed those deeds, conveying to him the four acres of land which were registered in the registry office of the county of Glengarry, and John N. and those claiming under him would probably be bound, under the reference made to these deeds, to admit they were executed and were valid instruments.

The wording is no doubt peculiar. After mentioning that the land granted was the west half of lot No. 36 in the second concession of the aforesaid township of Lochiel, containing one hundred acres, more or less, it then proceeds, "with the reservation of four acres *already* made by deeds of conveyance to the said party of the third part, (the plaintiff) from Catharine McDonald and John N. Williams, which are recorded," &c.

It may be contended that the words as here used ought to be interpreted, "I reserve these four acres out of the deed, because you already (now) own them under certain deeds."

I think the more reasonable view is, "I reserve them out of the deed because I and those under whom I claim have *already* (heretofore) conveyed them under certain deeds, which are referred to, and I cannot covenant that I have a right 'to convey' these four acres of land."

None of the cases cited and referred to in *Darby & Bosanquet* on Limitations, decide that an express admission of

a person being the owner of land at a certain anterior period, would imply that it was owned by the same person at *the time* the admission was actually made.

Hobson v. Burns, 13 Ir. L. R. 286, seems to be an express authority, that the effect of such an admission merely is, that it admits the persons were the owners at the period to which the admission refers, and not at the time the admission was made.

We now come to the question of the one acre. The three acres having been conveyed to the plaintiff in 1849 and having been in the uninterrupted possession of John N. Williams and the defendant ever since, more than twenty years have elapsed since his right to bring an action under the statute accrued, and therefore on the principles discussed in the authorities cited, the plaintiff's right to recover as to those three acres is gone.

As to the acre conveyed to the plaintiff by John N. Williams, on the 10th June, 1851, the learned Judge, who tried the cause without a jury, seems to have considered, under the facts of the case, that he was a tenant at will. The plaintiff undoubtedly bought the land from John N. Williams, paid him for it, and received the conveyance, and registered it. He also allowed him to remain in possession. He did not, apparently, in any way interfere with him, and he came to the place from time to time to see his mother. There is nothing to shew he ever intended or desired to take or keep possession of that, or the other three acres, or that he in any way terminated a tenancy at will, if such existed.

The facts as to that occupation resemble in many respects that of the defendant in *Turner v. Doe d. Bennett*, 9 M. & W. 643, already cited, so far as the occupation prior to 1820 in that case is concerned, and there the defendant seems to have been considered a tenant at will, up to that time, when the will was terminated and a new tenancy commenced.

If then as to the one acre, John N. was to be considered a tenant at will in the possession, which began after the

conveyance of that acre by him to the plaintiff on the 10th of June, 1851, then that tenancy under the statute would be considered at an end on the 10th June, 1852, and if the action were commenced within twenty years from that day, his right would not be barred by the statute.

The writ was issued on the 14th June, 1871, and therefore within the twenty years.

The plaintiff, therefore, is entitled to recover for one acre, and the defendant is entitled to a verdict for the three acres. The verdict for the plaintiff for one acre will stand, and be entered for the three acres for the defendant, costs of this rule to be costs in the cause to the plaintiff.

MORRISON, J., concurred with the Chief Justice.

WILSON, J.—John N. Williams having made a mortgage in fee to the plaintiff of the west half of the lot in question, containing 100 acres more or less, “with the reservation of the four acres already made by deeds of conveyance to the third party (the plaintiff) from Catharine McDonald and John N. Williams, which said deeds are recorded,” &c. The question is, whether that mention of the four acres by John N. Williams, who was in possession at that time, is an acknowledgement by him of the title of the plaintiff under the Consol. Stat. U. C. ch. 88, sec. 15.

I understand this to mean that it excepts from the half lot the four acres already conveyed by deeds to the plaintiff, one of which deeds was made by the mortgagor himself for the one acre, and the other by the mortgagor's mother for the three acres.

In *Goode v. Job*, 1 E. & E. 6, one Morgan, in 1809, entered into an agreement with one Westcott to have a lease, and Morgan was thereupon let into possession. Westcott, on the 1st of January, 1810, assigned his interest in the land subject to certain sub-leases, and subject also to Morgan's agreement for a lease, to the plaintiff and one B. Goode. Morgan afterwards filed a bill against the plaintiff and others, to have a lease executed to him according to the

agreement of 1809, and a decree was made to that effect. The defendants to that bill filed a bill against Morgan for specific performance of certain agreements by him with them. To that bill Morgan put in two answers, dated respectively the 4th March, 1825, and 8th February, 1839. In the second answer, he said he had no doubt that previously to the 7th of February, 1811, he informed the plaintiff and B. Goode, "that he," this defendant, "had entered into an agreement with Richard Westcott for a lease, or underlease, of the ground in the said bill in that behalf mentioned, and referred to, and whereon one of the said four houses in Acre Place was built; and which house was and is occupied by this defendant; and which agreement was dated 29th March, 1809, and was made between the said Richard Westcott and this defendant, comprising a parcel of ground therein described as situate," &c., "and then let on lease to the said Richard Westcott for a term of sixty-five years." The defendant derived title under Morgan.

Wightman, J., said, during the argument, at p. 8, "The statement in the answer of 1839, that in 1811 he admitted the plaintiff's title, would not be sufficient of itself." Counsel answered, "No; but that answer also states that Morgan, both before and at the time of putting in the answer, was in possession of one of the houses on, and had previously entered into an agreement with, Westcott for a lease of, part of, the land." [Lord Campbell, C. J.—"That may be sufficient."]

In giving judgment, Lord Campbell, C. J., said, at p. 10: "The answer made by Morgan, in 1839, contains a distinct acknowledgment that he holds under the agreement with Westcott, in 1809, and that the residue of Westcott's term had been assigned to the plaintiff and the deceased B. Goode; that is in fact an admission that Morgan was holding as tenant from year to year, and is a distinct acknowledgment that the legal estate was in them * * * It is, in effect, as if he had written, 'I acknowledge that I hold under you, and that this lease ought to be granted by you to me.'" The other Judges speak to the same effect.

The case of *Trulock v. Robey*, 12 Sim. 402, is referred to in the preceding case, and there the Vice Chancellor said : at p. 406, "The Court must construe the letter in the way in which the writer intended it to be construed by the person to whom it was addressed."

I refer also to *Jayne v. Hughes*, 10 Ex. 430, and to *Ley v. Peter*, 3 H. & N. 101; *Blanchard v. Bridges*, 4 A. & E. 176.

Here John N. Williams, when he made the mortgage to the plaintiff, knew that he himself had some years before that time made a conveyance of one acre of the half lot to the plaintiff, and also that his mother had, about the time last referred to, made a conveyance of three acres of the same half lot to the plaintiff, and that he could not therefore give the plaintiff a mortgage upon his own four acres for the money the plaintiff was lending to or advancing for the mortgagor; and so he excepted that portion of the half lot from the mortgage as land *already* conveyed to the plaintiff.

That was, and is,—taking the words in connection with the transaction then going on between the parties, and looking at the relative position of the parties, the one conveying and the other receiving the mortgaged land,—an express and unequivocal declaration in writing that the plaintiff's title to the four acres was a valid and subsisting title at that time.

In effect, the mortgagor said, "The reason I do not give you these four acres is, because you own them or have got them already by deeds before made to you."

If John N. Williams had been selling absolutely the half lot to the plaintiff, excepting the four acres already conveyed to him, I think it could not be said, with any force or propriety, that such a declaration, under such circumstances, was not an acknowledgment of present title in the purchaser of these four acres.

Rule absolute to enter verdict for plaintiff as to the one acre, and for defendant as to the three acres.

WOLFENDEN ET AL. v. WILSON (Administrator of Margaret Ann Wilson, deceased.)

Contract to furnish tombstone—Whether one for sale of goods or work and labor.

One W. during her lifetime verbally ordered from the plaintiffs a tombstone, to be put up by them at the grave of her late husband. It was begun before and completed by them after her death, and they sued her administrator for the price: *Held*, that the plaintiffs' claim was for the sale of a chattel, not one for work and labor; and there being no contract within the Statute of Frauds, that the plaintiffs could not recover.

Lee v. Griffin, 1 B. & S. 272, followed.

DECLARATION on the common counts for money payable to the plaintiffs by defendant as administrator for goods bargained and sold, &c., by the plaintiffs to Margaret Ann Wilson.

Pleas—1. That Margaret Ann Wilson was never indebted as alleged. 2. *Plene administravit*.

The cause was tried before Galt, J., without a jury, at the last Fall Assizes at Whitby.

From the evidence given at the trial it appeared that the defendant was married in November, 1869, to a Mrs. Smith, who was the widow of one George Smith. She died on the 16th October, 1871. At the time of her marriage she had personal property, household furniture, some of which she took with her when she went to live with defendant; one witness said about \$300 worth; and she had an annuity from her first husband's estate of \$400 a year. She left the defendant's house in July, and resided with a daughter up to the time of her death. When she was ill, and about two or three months before her death, she ordered from the plaintiffs a tombstone, to be put up at the grave of her first husband. The monument or tombstone was put up after her death, but the base of the monument was taken to the grave yard and probably was set up before her death. It did not appear how far the work had advanced at the time of Mrs. Wilson's death, or if she was aware that any portion of it had been delivered before she died.

The particulars of plaintiffs' demand, attached to the record, were :

June 1st, 1871. Iron fence and four marble	
posts, chains, rods, and tassels	\$31 00
The monument and extra setting.....	255 00
	<hr/>
	\$286 00
Interest thereon	

The executor of her first husband's estate settled with Mrs. Wilson in August, and there was \$237 owing to her.

The defendant assigned to one Coulthard the claim the intestate had against her first husband's estate in October, 1871, for \$25, and letters of administration were granted to him on the 23rd May, 1872.

At the close of the plaintiffs' case, the defendant's counsel objected that there was no evidence of goods sold and delivered to Mrs. Wilson before her death. 2. There was no evidence of any contract or part performance to take it out of the Statute of Frauds. 3. That in 1871 a married woman had no power to enter into such a contract. 4. There was no evidence of assets. The last objection was overruled.

The learned Judge found for the plaintiffs, giving the defendant leave to move to enter a nonsuit on any ground raised by the evidence.

In Michaelmas term last *McMichael*, Q. C., obtained a rule *nisi* to set aside the verdict and enter a nonsuit, pursuant to the leave reserved, or for a new trial, on the ground that the verdict was contrary to law and evidence, there being no evidence of any goods sold and delivered to the intestate in her lifetime, the contract, if any, being an unexecuted contract at the time of her death : that being a married woman, she was not capable of entering into a contract : that there was no evidence of a contract to satisfy the Statute of Frauds : that no goods were shewn to have come into the hands of the administrator, which were not fully administered.

The rule was enlarged until this term, when *Harrison*, Q. C., shewed cause. The contract is for work and labour rather than for goods sold and delivered, and that being the case, the contract is good and binding under the Statute of Frauds: *Clay v. Yates*, 1 H. & N. 73, 78; *Grafton v. Armitage*, 2 C. B. 336; *Lee v. Griffin*, 1 B. & S. 272; *Atkinson et al. v. Bell*, 8 B. & C. 277; *Mixer v. Howarth*, 21 Pick. 205; *Courtright v. Stewart*, 19 Barb. 455; *Spencer et al. v. Cone et al.*, 1 Metcalf 283; *Allen et al. v. Jarvis*, 20 Conn. 38; *Crookshank v. Burrell*, 18 Johns. 58; *Donovan v. Wilson*, 26 Barb. 28; *Edwards v. Grace*, 2 M. & W. 190; *Marshall et al. v. Broadhurst*, 1 C. & J. 403; *Corner v. Shew*, 3 M. & W. 350; *Rogers v. Price*, 3 Y. & J. 28; *Lucy v. Walrond*, 3 Bing. N. C. 841; *Peries v. Aycinena*, 3 Watts & Serg. 67.

This action was commenced after the statute authorizing a married woman to be treated as if she were *sole* as to being sued, was passed. *Merrick et al. v. Sherwood*, 22 C. P. 467, decides that as the law now stands the intestate might have been sued, and therefore the defendant as her administrator is liable. He also referred to *Wright v. Garden et al.*, 28 U. C. R. 609. The 35 Vic. ch. 16, sec. 9, O.; Consol. Stat. U. C. ch. 73, sec. 14, read together shew the course and tendency of legislation, and we have a right to look at that. If the defendants wished to avail themselves of the fact that Mrs. Wilson was a married woman, they should have pleaded coverture. See also *Chamberlain v. McDonald*, 14 Grant 447; *Dalton v. Midland Counties R. W. Co.*, 13 C. B. 474.

As to assets, the evidence shewed there was plenty: *Williams on Executors*, 7th ed., vol. ii. 1965; *Reeves et al., v. Ward*, 2 Bing. N. C. 235; *Britton v. Jones*, 3 Bing. N. C. 676; *Stroud v. Dandridge*, 1 C. & K. 445.

McMichael, Q. C., contra. The defendant is not sued on a contract. The declaration, as it now stands, clearly requires amendment, and if amended the defendant should be permitted to plead his late wife's coverture. At the time of her death, if the work had been finished, she could not

have been sued in a Court of law, because the late statute had not then been passed : *Wright et ux. v. Garden*, 28 U. C. R. 609 ; *Chamberlain v. McDonald*, 14 Grant 447 ; *Kraemer v. Glass*, 10 C. P. 470 ; *Leake on Cont.* 234 ; *Addison on Cont.*, 6th ed., 177 ; *Werner v. Humphreys*, 2 M. & G. 853, 857 ; *Clay v. Yates*, 1 H. & N. 73 ; *Watson v. Friend*, 10 B. & C. 446 ; *Cooper v. Langdon*, 9 M. & W. 60 ; *Hayden v. Hayward*, 1 Camp. 180.

The defendant did not receive the claim of his wife against the estate of her former husband, he merely released his right to it, before he obtained letters of administration.

He also cited *Churchill v. Bertrand*, 3 Q. B. 568 ; *Burch v. Leake*, 7 M. & G. 377 ; *Smith v. Chance*, 2 B. & Al. 753.

RICHARDS, C. J., delivered the judgment of the Court.

Under the present declaration the plaintiff could not recover, for the monument was not delivered to Mrs. Wilson during her life.

The evidence does not shew what kind of a monument it was, but if we are to assume it was similar to those we see on exhibition in marble works yards, we may safely conclude that the sale when carried out would have been the sale of a chattel, and could have been sued for as goods sold and delivered. The plaintiffs seem so to have considered it, for it is for that they have sued.

The fact that the seller may have agreed to place it in a particular grave yard, or particular part of a cemetery, would not make it any the less a chattel.

The sale of a pump would be the sale of a chattel, though the seller had agreed to place it in position on the grounds of the purchaser.

The purchase of a steam engine would be the purchase of a chattel, though the seller might agree to fit it up.

Here, as there was no agreement in writing, if the sale was the sale of a chattel it would not be binding under the 17th section of the Statute of Frauds.

The fact that the article was not then made or ready for

delivery, under Lord Tenterden's Act, 4 Geo. IV., ch. 14, sec. 7, which is the same as our Consol. Stat. U. C., ch. 44, sec. 11, would still bring the contract under the Statute of Frauds, and make it bad.

In *Blackburn* on the Contract of Sale, p. 9, in referring to the two statutes, it is laid down, "The statutes therefore are now applicable to all contracts for the sale of goods, wares, and merchandise, words which, as has already been said, comprehend all tangible movable property."

In *Clay v. Yates*, 1 H. & N. 73, where the action was by the printer, against the author of a book, for printing it, Pollock, C. B., reviewed the authorities, and came to the conclusion that in these cases, the "true criterion is, whether the work is the essence of the contract, or whether it is the materials supplied."

He said, p. 78, "My impression is, that in the case of a work of art, whether in gold, silver, marble, or plaster, where the application of skill and labour is of the highest description, and the material is of no importance as compared with the labour, the price may be recovered as work, labour, and materials. No doubt it is a chattel that was bargained for, and, if delivered, might be recovered as goods sold and delivered; still it may also be recovered as work, labour, and materials."

He adds, "I am inclined to think that it is only when the bargain is for *goods* thereafter to be made, and not where it is a mixed contract for work and materials to be found, that Lord Tenterden's Act applies."

In *Lee v. Griffin*, 1 B. & S. 272; the action was brought against the executor of a deceased lady for the value of a set of false teeth. The teeth were made, and ready to be fitted to her mouth, the dentist having taken a model of her mouth to make the teeth. In reply to a letter requesting her to appoint a day when he could see her for the purpose of fitting them, she said, "I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days." Shortly after writing the letter the lady

died, and the action was brought against her executor, for goods bargained and sold, goods sold and delivered, and for work and labour done, and materials provided by the plaintiff, as a surgeon-dentist, for the testator. It was held that there was no sufficient memorandum in writing to take the case out of the statute.

The cases favourable to the plaintiff's view, particularly *Clay v. Yates*, 1 H. & N. 73, were pressed on the consideration of the Court without effect.

Blackburn, J., in his judgment, p. 277, said, that in cases of this kind, "We must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed, is an illustration of this latter proposition. It cannot be said, that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. * * * I do not think the test to apply to these cases is, whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel."

We think *Lee v. Griffin*, 1 B. & S. 272, lays down the rule applicable in this case, and although Mr. Justice Blackburn does not agree with the views expressed by Chief Baron Pollock, in *Clay v. Yates*, 1 H. & N. 78, yet he does not dissent from the decision in that case.

We think the doctrines laid down in *Lee v. Griffin*, 1 B. & S. 272, reasonable, and reconcilable with the weight of authority on the principal point raised.

We should hesitate before deciding contrary to the opinion of so high an authority on the subject of sales as Mr. Justice Blackburn, even when his views might seem to conflict with decided cases: but when, as in the case referred to, they seem consistent with the weight of authority, we feel bound to adhere to them, particularly as they appear to contain the true exposition of the law on the subject.

Entertaining these views, we need not discuss the other questions raised on the argument.

The rule will be absolute to enter a nonsuit.

Rule absolute for nonsuit.

MCLEAN V. CROSSON.

Riparian proprietors—Right to flow of stream—Excessive damages.

The plaintiff and defendant were riparian proprietors on the river Humber, which in the neighborhood of their lands ran in curves, forming what were termed "oxbows." Across one of these oxbows, the land in which belonged to defendant, defendant several years ago, during low water, caused the sod to be removed a spade deep and thirteen inches wide. When the freshet came it made a new channel in the line of the trench thus cut, and deprived the plaintiff of the flow of the river along a portion of her land, and by directing the flow of the river against it washed away half an acre of her land, which was valued at \$70 per acre. The jury found for plaintiff, and \$500 damages:

Held, that defendant was clearly liable; for the plaintiff was entitled to the natural flow of the stream, which defendant by his act had interfered with: that the maxim *sic utere tuo*, &c., applied; and that it was no answer that the river would have forced its way through sooner or later.

Semble, that if the defendant had made the cut in the usual course of husbandry, and for the purposes of cultivation, he would still have been bound to take precautions to prevent the stream from forcing its way through, and thus injuring his neighbor.

It was objected on the argument, that the declaration charged the diversion of the water to be the direct act of the defendant, whereas it was caused by the freshet; but

Held, that as an amendment, if necessary, would have been allowed, this was no ground for new trial.

The learned Judge who tried the cause thought the damages excessive, and the Court discharged the rule on the plaintiff consenting to reduce the verdict to \$300.

DECLARATION—First count. That the plaintiff was pos-

sessed of a certain parcel of land in the Township of York, in the County of York, bounded on the westerly side thereof by the river Humber, and was entitled to the flow of the waters of the river along the westerly side of her land in the natural and ordinary course and channel of the river; and that defendant wrongfully and injuriously directed the course of the water of the said river and the channel thereof from the land of the plaintiff, whereby a small portion only of the said river ran in and along the westerly boundary of the plaintiff's land, whereby the use and enjoyment by the plaintiff of her said land has been and is greatly diminished, and the land has been injuriously affected.

The second count averred possession of the land, and the right to have the flow of the Humber in its natural and ordinary course and channel, and not otherwise, and that defendant being possessed of certain land adjoining the land of the plaintiff, along which the river flowed, wrongfully and injuriously diverted the course of the water and the channel thereof, so that the water thereof in large quantities flowed in, over, and upon the land of the plaintiff, and submerged a large portion thereof, whereby the land so submerged became lost to the plaintiff, and the river in its new channel has destroyed, and is destroying, more of the plaintiff's land than it would otherwise have done.

Third count. Trespass *quare clausum fregit* to lot 12 in the 4th concession west of Yonge street, in the Township of York, and for depositing thereon large quantities of water and stones, rubbish, and other stuff, whereby a large portion of the land of the plaintiff has been spoiled, damaged, and destroyed, and other large portions thereof are being spoiled, damaged, and destroyed.

Pleas—1. As to the whole declaration, Not guilty. 2. To the first and second counts, that the plaintiff was not entitled to the flow of the water of the said river as alleged.

Issue.

The cause was tried at the last Spring Assizes at Toronto before Hagarty, C. J., C. P.

The jury had a view of the premises before the trial began.

It appeared from the evidence that the plaintiff and defendant were owners of land adjoining the river Humber, which in that neighbourhood separates the Township of York from the Township of Etobicoke. The river near the point in dispute, does not run in a straight course, but inclines to the north in two different places near the land of the plaintiff and defendant, forming what the witnesses called the small and large oxbows. The land enclosed within the large oxbow was about five acres, that in the smaller one was one acre.

The defendant bought both of these pieces of land from the owner, described as belonging to certain township lots in Etobicoke. The smaller piece was conveyed to him in 1856, and he had then cut a ditch across the tongue of land forming the base of the small oxbow, whereby the main course of the stream was turned from running into the oxbow, and went in a direct course across the tongue.

He purchased the land comprised within the larger oxbow on the 27th October, 1857, the original channel of the stream forming the oxbow.

The river formed part of the division line between plaintiff's land in the Township of York and the land formed by the oxbow, which was in Etobicoke. The general course of the river there is east and south. The larger oxbow was formed by the river turning sharply northward on lot 2 in the Township of York, owned by defendant, a distance of about eight chains, and then returning to the original course of the stream, passing a distance of five or six chains along the land of the plaintiff, and taking the original course of the stream at a distance of about thirty links from the place of departure, the wider part of the land enclosed within the oxbow being, apparently, about five chains.

The act complained of was, that defendant caused to be cut a drain across this narrow neck of land, which, when the rush of water came, became enlarged, and finally

forced a new channel through it one chain and twenty links wide, and the water rushing through the channel had worn away the bank of the river on plaintiff's land in one place one chain and ten links beyond the old bank of the river, and in another one chain and sixty-seven links, and had diverted the water from plaintiff's land entirely above the new cut.

It was also shewn in evidence that at the neck of the the land at the base of the ox-bow there was a good, strong bank about nine feet high. About five or six years ago the sod, about thirteen inches wide, was lifted as if with a spade. It was not then washed away, but every spring after the water ran through and gradually made the opening deeper. It first broke through about two or three years ago. The defendant had bought the land before the witnesses saw the spade mark. A quarter of an acre of plaintiff's land had been washed away, and it was in danger of being washed more, the river eating into the bank every year. In the spring of the year at the freshets the water flowed over the neck of land, but in the ordinary flow it passed round. The sod was cut out thirteen inches wide, in chunks, and thrown up on the bank. The river changed its course over two years since.

One witness stated that defendant wished to employ him some eleven or twelve years ago to cut across the neck, and offered him \$10 to do it, which he declined.

It was said if the neck were worked it would probably wash away, and the safest way was to keep it in sod. The excavation was about a spade deep.

Several witnesses spoke of conversing with defendant on the subject of the cut. He said he did not deny wanting Smith, a witness, to cut it; he wanted it cut higher up than it was, so as not to injure the plaintiff. He told a fence-viewer he had cut the little bow across; that he did not intend to have the big bow cut where it was; that he had bought a piece of land for the purpose of cutting it there. To his brother, who was called, defendant said, first he bought the neck, and then he bought another acre for the purpose of cutting it through.

The defendant was the party benefited by the change in the bed of the river. One witness said the ditch was deeper and wider on the defendant's side of the bank.

The defendant was called, and denied making the spade cut, or causing it to be made, and did not know who did it. He said when he bought the neck it was much wider; it was narrowing every year. It became quite narrow. He did not want Smith to cut it unless he got plaintiff's consent. What was cut was a great injury to him; \$100 damages. It had to break through, he could not help it. He wanted it cut by Smith where it was if the plaintiff would agree. He said he first heard of the cut a year after it was made.

Several witnesses were called to shew that the bank was washing away several years before the cutting was made, and the river forcing its way through was considered as only a question of time. Further evidence was given to shew that defendant wanted it cut through.

The learned Judge left it to the jury to say, whether defendant by his act, intending to alter the course of the river, had done so. He explained that he meant "intending to alter the course of the river," as opposed to anything done in the *bonâ fide* exercise of his right to plough or cultivate his own land. They were directed to find the whole damage, permanent as well as temporary. He told the jury the defendant contended, first, that he did not do the act complained of; and that whether he did it or not, nature would have done it in a very short time.

The jury found for the plaintiff, \$500 damages.

No objection was made to the charge.

In Easter Term *M. C. Cameron*, Q. C., obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for excessive damages, and for misdirection, in telling the jury that defendant would be liable if he made the trench on his own land, intending it should take the water through his land, though at the time it was made it would not have that effect, or until high water.

The rule was enlarged until this term, when *Harrison* Q. C., shewed cause.

The evidence was left to the jury, to say if defendant had cut through the soil and disturbed the natural condition of the bank. They found for the plaintiff, and there is no good reason for disturbing the verdict on that ground. It was cut through just before a freshet, and the evidence all shewed that, from the peculiar formation of the bank, the result which followed, the washing out of a new channel in the line of the excavation, was what might have been expected, and probably was intended. The doctrine of *sic utere tuo*, &c., applies to this case. The plaintiff had the right to the natural flow of the stream, through its natural channel, and defendant having disturbed that is liable to the plaintiff for the injury inflicted: *Fletcher v Rylands et al.*, 3 H. & C. 774, L. R. 1 Ex. 265, L. R. 3 H. L. Cas. 330, 340; *Lambert et al. v. Bessey*, Sir T. Raym. 421, 422; *Tubervil v. Stamp*, 1 Salk. 13, Ld. Raym. 264; *Smith v. Kenrick*, 7 C. B. 515; *Bagnall et al. v. The London and North Western Railway Co.*, 7 H. & N. 423, 1 H. & C. 544; *Baird et al. v. Williamson et al.*, 15 C. B. N. S. 376; *Bonomi et ux. v. Backhouse*, E. B. & E. 622; 9 H. L. Cas. 503; *Bickett v. Morris et al.*, L. R. 1 H. L. Cas. 47, (Scotch Appeals); *Carstairs et al. v. Taylor*, L. R. 6 Ex. 217; *Ross v. Fedden et al.*, L. R. 7 Q. B. 661; *Smith v. Fletcher et al.*, L. R., 7 Ex. 305. The doctrine well established in all the cases is, that the owner of land through which a running stream passes has a right to have the water flow by his land in its usual and natural course, without being interfered with by any other riparian proprietor. This stream, the Humber, did flow along the plaintiff's land. It has now ceased to flow where it formerly did, and runs in a different manner, to the plaintiff's prejudice, and the change complained of was caused by the act of the defendant. The plaintiff has therefore the right to recover. The question of damages was for the jury; they had a view of the premises, and their verdict ought not to be interfered with.

M. C. Cameron, Q. C., and *McMichael*, Q. C., supported the rule. The damages are excessive. The land of the plaintiff lying along the river from which it has been turned away does not exceed four or five acres in front, and the land actually carried away by the rush of water through the new channel is not more than half an acre. The highest estimate of the value of the land is not more than \$70 an acre. Besides, the plaintiff may compel the defendant to restore the bank to its former condition. The defendant had a right to dig a ditch on his own land, and if the rise of the water caused the land to be swept away, it was not the act of the defendant, certainly not his direct act. The declaration alleges it was his direct act, instead of charging him with so carelessly cultivating his ground that the water flowed through it on the plaintiff's land, injuring it. *McDougall v. Wadsworth* shews that defendant was justified in digging a ditch on his own land. The ditch was very small. The evidence shewed that the river would itself have found its way through the tongue of land where the ditch was dug. The act of the defendant was not a diversion of the water. The land was covered by a sod, and if the defendant, in the usual course of husbandry, as he had a right to do, had removed the sod, the land being soft when the water rose would be carried away and a ditch or channel would be made.

Harrison, Q. C., in reply. If the Court is of opinion on the evidence that the damages are excessive, the plaintiff is willing to accept a reduced verdict.

RICHARDS, C. J., delivered the judgment of the Court.

In *Bagnall et al. v. The London and North Western Railway Co.*, 7 H. & N., at p. 450, in giving the judgment of the Court, Baron Bramwell said: "It seems to us impossible to state these facts without shewing that the plaintiffs have a claim on the defendants of some kind. Without any fault of theirs the natural condition of things had been altered, the water of the brook, which flowed at a distance of one-third of a mile from their mine,

inaccessible to it by being separated from it by ground twenty-five feet high, has been diverted over it, its natural covering and upper soil removed from it. From the last mentioned circumstance and want of efficient drains the rain which fell on it, and the springs which arise in the cutting, have got into it. These are the acts of the Railway Company alone."

In the case before us, without the fault of the plaintiff, the natural condition of things has been altered; the water of the stream which flowed by plaintiff's land has been diverted, and thrown against another part of her land, carrying away a portion of the soil, and the bank, which prevented the water from flowing against her land, at the point where a portion of it has been carried away by the action of the water, has been removed, as the jury have found, by the act of the defendant in causing a ditch to be dug which directed the force of the main body of the stream in high water through the bank, destroying a portion of it, and carrying away half an acre of the plaintiff's land. These are the acts of the defendant.

It is urged that the defendant had a right to dig the ditch on his own land, and that if the ditch had not been dug, in the natural course of things the stream would have forced a passage through the narrow neck of land, and thus have diverted the flow from plaintiff's land at one point, and against it at another.

Baron Bramwell, in *Smith v. Fletcher*, L. R. 7 Ex., at p. 312, meets a similar argument as follows: "The plaintiff has a right to say, 'You have caused this; had you left nature to itself, worse might indeed have happened, but that would have been my misfortune; perhaps it would not have happened; perhaps we could have guarded against it. I decline to discuss this. You may indeed have done me good; if so, you should have done more good.' * * * In fact the defendants have done that which has injured the plaintiff, and of that he is entitled to complain."

"Ever since the time of the Year Books it has invariably been held, that it is illegal to *divert* a watercourse,

unless authorized or justified by the particular circumstances of the case. The maxim of law which every riparian proprietor is bound to respect, as regards his right to the water, is, *sic utere tuo ut alienum non lædas*;" *Angell on Water Courses*, 6th ed., sec. 97.

In *Embrey v. Owen*, 6 Ex. 368, 369, Baron Parke refers to the series of cases on the law as to flowing water, beginning with *Wright v. Howard*, 1 Sim. & S., 190, followed by *Mason v. Hill*, 3 B. & Ad. 304, 5 B. & Ad. 1, and ending with *Wood v. Waud*, 3 Ex. 748, and 3 *Kent's Com.*, pp. 439, 445. He says: "The right to have the stream to flow in its natural state without diminution or alteration, is an incident to the property in the land through which it passes, but flowing water is *publici juris*, not in the sense that it is *bonum vacans* to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none have any property in the water itself, except in the particular portion which he may choose to abstract from the stream to take into his possession, and that during the time of his possession only: see 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the *usufruct* of the stream which flows through it."

Further on, he quotes approvingly from *Kent's Commentaries*: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple *usufruct* while it passes along. '*Aqua currit et debet currere*' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

The quotation is at greater length than I have abstracted it, but what I have copied of it shews sufficiently the right of the plaintiff to the natural flow of the stream without alteration.

I copy from the judgment of Lord Denman, in *Mason v. Hill*, 5 B. & Ad., at p. 24, the following extract from the Digest, Book 43, Tit. 13 : "In public rivers, whether navigable or not, it appears that every one was forbidden to lower the water or narrow the course of the stream, or in any way to alter it to the prejudice of those who dwelt near. Tit. 12 distinguishes between public and private rivers; and in section 4 it is said, that private rivers in no way differ from any other private place."

Lord Kingsdown, in giving judgment in the Judicial Committee of the Privy Council in *Miner v. Gilmour*, 12 Moore P. C. 156; S. C. 33 L. T. 99, speaking of the right of a riparian proprietor to the use of flowing water, says : "He may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts on them a sensible injury."

These authorities seem to establish, what was scarcely denied on the argument, that the plaintiff had, as an incident to the ownership of her land, the right to have the water of the Humber pass by it in its usual and natural flow.

The right of the owner of land to use his property as he may think proper for his own purposes was very much discussed in the case of *Fletcher v. Rylands*, L. R. 1 Ex. 265, affirmed in the House of Lords, L. R. 3 H. L. Cas. 343. The judgment in that case in the Exchequer Chamber of Blackburn, J., was referred to in the judgment of this Court, in *Gillson v. The North Grey R. W. Co.*, ante p. 128, delivered in the sittings after Michaelmas Term.

The general doctrine already referred to would seem to make it necessary for the defendant, if he were in good faith using his land for the purposes of agriculture gene-

rally, to take measures to prevent the stream from forcing its way through the tongue of land referred to, because if it did so it would injure the plaintiff, his neighbour.

But here the act was done no doubt for the express purpose of having the stream force its way through this tongue of land, and that has injured the plaintiff. It is not pretended any precautions were taken to prevent the water when thrown against the plaintiff's land from injuring it, even if that would have relieved the defendant from responsibility.

But the right which the plaintiff had of the natural flow of the stream past and in front of her own property has been interfered with, and the defendant, though owning the land which was cut through, could not legally use it so as to deprive the plaintiff of her right to the natural flow of the water.

In *Re Williams v. Groucott et al.*, 4 B. & S., at p. 157, Blackburn, J., says: "Now, looking at the general rule of law that a man is bound to use his property so as not to injure his neighbour, it seems to me, that when a party alters things from their *normal* condition so as to render them dangerous to already acquired rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights." In that case the defendant was entitled to the minerals under the plaintiff's land, with a license to make a main shaft opening into it. It was held, in the absence of any stipulation to the contrary, that defendant was under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent it being a source of danger to his cattle which might be on the land.

The words of Gibbs, C. J., in *Sutton v. Clark*, 6 Taunt. 44, are frequently quoted in actions of this sort as illustrating the doctrine of *sic utere tuo ut alienum non lædas*, "Where an individual, for his own benefit, makes an improvement on his own land according to his best skill and diligence, and not foreseeing it will produce an injury to his neighbor, if he thereby unwittingly injure his neighbor he is answerable."

The well known case of *Humphries v. Brogden*, 12 Q. B. 739, decides that the owner of minerals has no right to work the mine without leaving sufficient support for the soil above, and if he neglects to do this the occupier of the surface can maintain an action for injury he sustains by the subsiding of the surface soil. And the defendant was held liable though he worked the mines carefully and according to custom. *Jeffries v. Williams*, 6 Ex. 792, seems to be to the same effect.

In the very late case of *Smith v. Fletcher et al.*, L. R. 7 Ex. 305, the doctrine of *Fletcher v. Rylands* is adhered to, and the doctrine of *sic utero tuo, &c.*, is carried apparently further than in that case.

In *Smith v. Fletcher et al.*, already quoted from on another point, the defendants were owners of land in which there was iron ore, a portion on the surface, and a portion beneath. The quarrying on the surface caused a large hollow of various depths. The excavation beneath the surface probably caused a subsidence of the earth above, which made fissures down which the water could escape. The lower parts of the hollow were not water tight. A flood came and a brook overflowed, and the water instead of passing over the surface and getting away, as it would have done, got into the hollow made by defendants, and escaped through the fissures and cracks into defendants' mine, and thence into the plaintiff's.

In reply to the argument that the defendants did not bring the water there, as was the case in *Fletcher v. Rylands*, Baron Bramwell said at p. 310, "Nor did they in one sense; but in another they did. They so dealt with the soil that if a flood came the water, instead of spreading itself over the surface and getting away to the proper water courses innocuously, collected and stopped in the hollow with no outlet but the fissures and cracks. Suppose the rain, without a flood, falling in this hollow, had made, as it will, pools in the lower part, and the water so collected had gone through the fissures and cracks into the mine, instead of being left

on the surface to evaporate and percolate naturally, and that the damage to the plaintiff had been sensible, could the defendants say they were not liable because they did not cause the rain to fall? So again, can they say they did not cause this flood water to collect where it did with no outlet except to the mines, because it came there by the attraction of gravitation? It is said the flood was extraordinary, and they could not foresee it. I repeat my remark, that that may take away moral blame from them, but how does it affect their legal responsibility? If for their own purposes they had diverted this flood into the hollow, when it came, then, though not knowing what would happen, it is clear they would be liable. Why are they not if it comes because it must come, from natural causes?"

It seems to me the language of the learned Judge, above cited, carries the law much further than is necessary to make the defendants liable for the injury complained of in this action.

I have a note of an American case which in effect holds that a defendant who improperly interferes with the natural banks of the stream is liable for the injury caused by the interference. "If by raising the water in a natural stream above its natural banks, and to prevent its overflow, artificial embankments are constructed, which answer the purpose perfectly, yet if by the pressure of the water upon the natural banks of the stream, percolation takes place so as to drown the adjoining lands of another, an action will lie for the damage occasioned thereby. It matters not whether the damage is occasioned by the overflow of, or the percolation through the natural banks, so long as the result is occasioned by an improper interference with the natural flow of the stream: *Pixley v. Clark et al.*, 35 N. Y. 520."

The objection urged on the argument, that the declaration charged that the injury was the direct act of the defendant, and not the result of his careless or unskilful mode of digging the ditch or cultivating his ground, was not taken in the rule, or at the trial, as far as appears from the notes of the learned Chief Justice.

The declaration charges that defendant diverted the water of the river and the channel thereof from plaintiff's land. It does not say by digging a certain ditch just before a freshet, which diverted the course of the stream from plaintiff's land, and by the action of the stream so diverted caused the same continuously and up to the present time to flow away from her land, and thereby permanently changed the course of the said stream. I dare say if the objection had been taken at the trial an amendment would have been permitted, if necessary. We would not now grant a new trial to have a case tried over, when the plaintiff could recover on such an amended declaration, even if it was clearly shewn that the amendment was necessary.

There can be no doubt that the defendant had a perfect right to dig a ditch on his own land, provided that by doing so he did not cause injury to his neighbor. But to admit that the owner of land adjacent to the bank of a river has the right to excavate the bank, so that when the water rises the course of the stream may be diverted from its natural channel adjoining the premises of another riparian proprietor, would be equivalent to saying that his right to control the stream was not subject to the equal right of his neighbor to have it flow in its natural course.

We think the plaintiff clearly entitled to recover, but as the learned Judge who tried the cause thinks the damages are too large, on the plaintiff's consenting to the verdict being reduced to \$300, the rule will be discharged.

Rule discharged.

TAYLOR V. HORTOP.

Lease—Destruction of premises by fire—Determination of term thereby—Estoppel by judgment recovered.

Action on defendant's covenant to pay rent, contained in a lease to him by plaintiff of a mill, for nine years from 15th December, 1868, at a yearly rent, payable half-yearly in advance on the 15th June and December, in each year, alleging non-payment of three half-yearly instalments of rent reserved.

Plea, by way of estoppel, that previous to this action the lessee (now defendant) sued the lessor (the now plaintiff) in the County Court, alleging in his declaration that by the lease, in the event of total destruction of the mill by accidental fire the term should cease, and the rent be apportioned: that upon such destruction on the 30th October, 1860, the said term ceased, and the lessor became liable to refund to the lessee such part of the rent paid in advance as on a just apportionment should be found due, and the lessee alleged in such action that \$137.50 thus became due to him, for which he sued therein; that the lessor pleaded in such action that the said lease was not his deed, and issue being joined thereon the lessee recovered judgment for the said sum of \$137.50. The plea then alleged that the judgment remained in force, and that the rent sued for in this action was rent accruing due after the said 30th October, 1869.

To this the plaintiff replied, that after such fire the defendant continued to hold and occupy, and still holds and occupies the premises under and by virtue of the lease, and would not and did not put an end to said term or surrender said premises.

Held, a good plea; for though the plea of *non est factum* did not put in issue the destruction of the mill and consequent determination of the term, yet these facts being necessarily averred in that action, and not denied, were admitted for the purpose of such action, and the lessor was now estopped from disputing them.

DEMURRER. Declaration that the plaintiff, by deed, let to defendant a flour mill and mill premises, situate in the village of Erin, to hold from the 15th of December, 1868, until the 13th of December, 1877, at the yearly rent of \$1,100, payable in two equal portions of \$550 each, in advance, on the 15th days of December and June; and the defendant, by the said deed, covenanted with the plaintiff to pay him the same rent as aforesaid, yet three half-yearly portions of the said rent so covenanted to be paid on the 15th of December, 1869, and on the 15th days of June and December, 1871, are due and unpaid.

Plea, that the plaintiff ought not to be admitted to say that the said rent, or any part thereof, is due and unpaid to the plaintiff, because the defendant says that, before this suit, the now defendant brought an action against the now plaintiff in the County Court of the

County of Wellington, and declared against the now plaintiff, in and by the first count of the declaration in his said action, for that the now plaintiff by deed, demised to the now defendant a mill and premises, with the appurtenances, to hold from the 15th of December, 1868, until the 15th day of December, 1877, at the yearly rent of \$1,100, payable by two equal portions of \$550 each, half-yearly in advance, on the 15th day of December and the 15th day of June, in each year during the said term, the first of such payments to be made on the day and year first aforesaid; and thereby agreed with the now defendant, that in case the said mill should become untenable through accidental fire, or other fire, the act of any person other than the culpable act or neglect of the lessee personally, or through tempest or lightning, a reduction or abatement in the rent proportionate to the injury done, and for the time the same should remain unrestored, should be made, and that, in case of the total destruction thereof through or by any of said means, and not through the culpable act or neglect of the lessee personally, the term thereby granted should at once cease and be at an end, and that the rent should be adjusted at what on a just apportionment should be found to be the proportionate part thereof up to the time, and should be apportioned between the parties thereto accordingly; and the now defendant averred, that from the commencement of the said demise until the destruction of the said mill by fire as hereinafter mentioned, he, the now defendant, duly paid all the rent by the said deed reserved which up to the time of such destruction had become due and payable, including the half-yearly payment thereof which became due and payable in advance for the half-year commencing on the 15th of June, 1869, according to the terms of the said deed, and performed the covenants therein contained by him to be performed; and the now defendant further averred, that after the making of the said deed, and during the continuance of the said demise, and whilst the now defendant was pos-

sessed of the said demised premises, and during the currency of the said half-year of the said term which commenced on the said 15th of June, in the year last aforesaid, and for which the said rent was so paid in advance as aforesaid, to wit on the 30th day of October, 1869, the said mill was totally destroyed by accidental fire, and not through the culpable act or neglect of the now defendant personally; whereupon the said term immediately ceased and became at an end, and the now defendant became entitled to have the said rent adjusted and apportioned as aforesaid, and the now plaintiff became liable to refund and pay to the now defendant so much of the said rent so paid in advance by the now defendant as aforesaid, as on a just apportionment thereof should be found to be the excess of the said rent beyond the due proportionate part thereof, down to the said 30th day of October, 1869; and the now defendant further said, that on said last-mentioned day, when said total destruction by fire happened, and the said term ceased and ended, the sum of \$137.50 was the sum which upon a just apportionment of the rent reserved by the said deed would be and was the amount of the said rent so paid in advance by the now defendant over and above a due proportionate part thereof, down to the said 30th day of October, 1869; and that all conditions had been performed, &c., to entitle the now defendant to demand and have the said sum of \$137.50 from the now plaintiff, yet the now plaintiff had not paid the same. And the now plaintiff afterwards pleaded to the said first count of the said declaration, that the said alleged deed was not his deed; and the now defendant afterwards replied to the said plea of the now plaintiff in the said action by joining issue upon the said plea; and such proceedings were thereupon had in the said action, that afterwards the issue so joined in the said action came on for trial, and upon the said trial the Judge before whom the same was tried, as to the issue so joined as aforesaid, said that the said deed was the deed of the now plaintiff; and there-

upon afterwards, and since this suit, it was considered by the judgment of the said Court in the said action, that the now defendant should recover against the now plaintiff the said debt of \$137.50, with \$67.04 for the now defendant's costs of suit; and the said judgment still remains in force; and the deed and demise mentioned in the said first count of the said declaration in the said action, and the deed and demise in the declaration in this action mentioned, are the same; and the rent sought to be recovered by the plaintiff under the first count of the declaration in this action is the rent which, if the said demise had remained in force, would have accrued due under the said deed, for three half-yearly payments of such rent in advance, next after the said 30th day of October, 1869; wherefore he prays judgment, if the plaintiff ought to be admitted against the said record to say that the said rent in the declaration mentioned, or any part thereof, is due and unpaid to the plaintiff.

Replication: That after the said mill was destroyed, the defendant continued to hold and occupy the said premises and still holds and occupies the same, under and virtue of the said deed and demise in the declaration and plea mentioned, and would not and did not put an end to the said term, or surrender the said premises.

The defendant demurred to the replication, on the ground, that the replication confesses but does not avoid the said plea.

The plaintiff joined in demurrer, and gave notice of the following exceptions to the plea: That the action in the County Court did not try the question whether the term was put an end to, and that was not essential to or disposed of in that action; and that the plea of *non est factum* only admitted the allegations in the declaration in that action; 2. That the plea does not allege as a fact that the term was put an end to, but merely that it was so stated in the pleadings in the said County Court action; 3. That the said plea only professes to answer part of the plaintiff's

cause of action; 4. That the cause of action in the County Court was not any part of the rent in respect of which this action is brought; 5. That the plea ought to have shewn that the demised premises were in law and in fact surrendered; 6. That it does not appear but that the defendant still holds the said premises under the said demise; 7. That for anything which appears to the contrary in said plea, the defendant is entitled to hold the said premises under said demise, the same as before the fire took place. Joinder.

In Michaelmas term last, *Anderson*, Q. C., and *Guthrie* supported the demurrer. The plea shows a proper estoppel. The plea of *non est factum* pleaded in the former action, did put in issue the fact whether there was a deed containing such provisions as the plea shews was then set up. And if it were necessary to decide that point, there is an estoppel on the finding: *Boileau v. Rutlin*, 2 Ex. 665, 681; *Carter v. James*, 13 M. & W. 137; *Smith's L. C.*, 6th ed., vol. ii. pp. 707, 607, reviewing *Carter v. James*; *Regina v. Hartington, Middle Quarter*, 4 E. & B. 780, 794; *Howlett v. Tarte*, 10 C. B. N. S. 813, 827, 828; *Whittaker et al. v. Jackson et ux*, 2 H. & C. 926, 931. The substantial point in issue in the County Court suit was, whether there had or had not, from the facts, been a cesser of the term, on which issue the now defendant recovered. They cited also *Carscallan v. The Corporation of the Municipality of Saltfleet*, 17 C. P. 219, 224; *Chambers v. Dollar et al.*, 29 U. C. R. 599, 606.

M. C. Cameron, Q. C., contra. The provision as to cesser is to be construed as in the nature of a clause of forfeiture, to be taken advantage of or not at the election of the parties; and here it is shewn the defendant elected not to put an end to the term, and that the plaintiff has assented also to continue the term by his bringing this action for the rent. He referred to *Hortop v. Taylor*, 21 C. P. 56; and *Carter v. James*, 13 M. & W. 137. (a).

(a) See also *Taylor v. Hortop*, 22 C. P. 542, and *Cornock v. Dodds*, 32 U. C. R. 625.

WILSON, J., delivered the judgment of the Court.

The plea in this action sets out the declaration which was pleaded by the now defendant when he, as plaintiff in that action, sued the now plaintiff for the recovery of \$137.50, which he claimed to get back as part of the rent he had paid in advance from June to December, 1869, by reason of the destruction of the mill on the 30th of October, 1869, under the special clause in the lease which made provision to that effect, and which provided also that on such total destruction the term granted should at once cease and be at an end; and it shews that the now plaintiff denied there was any such deed ever made by him, by which he was to pay back the unearned rent, which had been paid in advance to him, in case of the total destruction of the mill, and the cesser of the term; and on the trial of the issue joined on that plea, he failed.

The substance of the claim then made, was that the term was, from the contingency provided for in the lease, at an end; and that the now defendant was entitled to get back from the now plaintiff the portion of the rent he had paid which was not earned, from the time of the ending of the term by fire up to the time to which he had paid the rent in advance.

Whether the lease did or not contain a clause which provided for the refunding of that money on the happening of the contingency, was directly in issue under the plea of *non est factum*, because it was for that very demand the action was brought.

The now plaintiff says the former action may be considered as conclusive of such a clause being in the lease, but it does not follow that it is also conclusive that a total destruction of the premises ever happened, or that the lease and term were to cease and be at an end upon the destruction of the premises.

The now defendant asserts, that it was only upon the determination of the term that the rent for that current half year was to be adjusted, and that such determination was only to be upon the destruction by fire; and that the

adjustment was to be the proportionate part up to that time, that is, to the end of the term; and so it was impossible he, as plaintiff, could have recovered in that action, unless the premises had been destroyed by fire, and unless the term had thereby been put an end to. There is no denial of the destruction of the mill by fire. If that had been pleaded and issue joined upon it, and found for the now defendant, it would, of course, have been conclusive of the fact of destruction. And upon that finding, the question of cesser of the term, which it is provided by the lease shall follow upon the loss of the premises, would operate as an estoppel under the deed.

The finding of the destruction would, by the record, be an estoppel, and the cesser of the term as dependent upon and operating by the destruction, would be an estoppel by the deed.

But, as stated, there is no traverse of either fact, nor is there any positive admission of them.

The question is, what did the plea of *non est factum* in that action, found against the now plaintiff, admit for the purposes of estoppel in this action?

That plea put in issue whether there was such a deed as the now defendant had set out. The other allegations of the declaration material in the cause were admitted for the purposes of that suit.

But all material facts which were alleged by the now defendant, as plaintiff in that action, among which were the destruction of the mill, and the averment that upon such destruction the term was to cease, were indirectly admitted by not being traversed, and by a traverse being taken on other facts; and such facts, so indirectly admitted, the now plaintiff is estopped from disputing, because the traverse he did take has been found against him: *Boileau v. Rutlin*, 2 Ex. 665, 681.

The now plaintiff is prevented from putting on the record a pleading which is inconsistent with any traversable allegation in the former action: *Howlett v. Tarte*, 10 C. B. N. S. 813, per Williams, J., 826.

If a defendant were to plead performance in an action, on a deed, he would be estopped from pleading *non est factum* in a later action on the same instrument: *Ib.*, per Byles, J., p. 828.

The case of *Carter v. James*, 13 M. & W. 137, is a decision in favour of the now plaintiff; but corrected as it is by *Boileau v. Rutlin*, 2 Ex. 665, and limited and explained as it is by *Hutt v. Morrell et al.*, 3 Ex. 240, it is not a decision for, but an authority against the plaintiff, inasmuch as he has failed upon the plea of *non est factum*, and so the estoppel arises and operates against him, because he has not traversed the other material allegations.

That case, of *Carter v. James*, is not an admitted authority, excepting in that qualified form and to that extent.

There is on this record a plain estoppel against the plea, valid in law to the extent that is set out.

But it is said by the plaintiff that the present plea does not shew such facts which have determined the tenancy: that, at most, the agreement gave to the parties the election to determine it, which they might waive at their pleasure; and that the defendant did assent to the term still going on under the deed by still occupying the premises.

The now defendant did elect to determine the tenancy, if there were any election about it, when he brought the former action to recover back the unearned rent. And after making that election he cannot go back from it: *Jones v. Carter*, 15 M. & W. 718.

There is no room for any such question. By the agreement of the parties, "the term hereby granted should at once cease and be at an end," on the total destruction of the mill, the principal subject of demise. And why it might not end on that event as well as by lapse of time, or on A. B. attaining twenty-one, or for so many years, if A. B. shall live so long, has not been shewn.

There is no doubt the lease could be made determinable on the destruction of the mill by fire, and upon that occurrence the term ended as fully as if it had expired by lapse of time. If there have been any holding of the

premises by the defendant since the expiration of the term, it could not have been under or by virtue of that deed, although it may have been and may be according to the terms of the deed so far as they are applicable. And the remedy for rent would not be by action upon the deed, because that is at an end, but on the count for use and occupation, or as on a parol lease: *Giddens v. Dodd*, 3 Drewry 485; *Tayleur v. Wildin*, L. R. 3 Ex. 303.

The judgment will be for the defendant on the demurrer.

Judgment for defendant.

MEMORANDA.

During this term the following gentlemen were called to the Bar:—

ROBERT HEBER BOWES, ALLAN JOHN LLOYD, JAMES RICHARDSON ROAF, JOHN GEORGE KILLMASTER, ISAAC BALDWIN MCQUESTEN.

EASTER TERM, 36 VICTORIA, 1873.

May 19th, to June 7th.

Present :

THE HON. WILLIAM BUELL RICHARDS, C. J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

STEELS V. HULLMAN.

Married Women's Property Act of 1872, sec. 9.

Declaration on a contract by plaintiff to build a house for defendant, alleging completion and non-payment ; and on the common counts.

Plea : that the making the contract and the contracting of the debts was before the Married Women's Property Act of 1872, and that at that time defendant was, and still is, the wife of T. H.

Replication : that the debt was the separate debt of the defendant, and was contracted for her own benefit, and in respect of her separate estate.

Held, following *Merrick v. Sherwood*, 22 C. P. 467, replication good for that the Married Women's Act of 1872, sec. 9, was retrospective.

Semble, the right to sue given by 35 Vic. ch. 16, sec. 9, is a mere matter of procedure, and imposes no new liability on the married woman.

DEMURRER. Declaration, first count,—that it was agreed by and between the plaintiff and defendant that the plaintiff should build a house for the defendant, in accordance with specifications agreed on between them, at and for the sum of \$700, to be paid in certain proportions, to wit, (setting them out) ; and all conditions were performed, &c., to entitle the plaintiff to the payment of the whole of said money, yet the defendant has not paid the same, &c. Common counts were added.

Sixth plea : that the time of the making of the alleged agreement and of the contracting of the alleged debts was before the passing of an Act to extend the rights of pro-

perty of married women, known as the "Married Women's Property Act of 1872," and at the said time the defendant was, and still is, the wife of Thomas Hullman.

Replication : that the debt in the declaration mentioned was, and is, the separate debt of the defendant, and was contracted by her for her own benefit, and in respect to her own separate estate.

Demurrer to the replication, upon the grounds, 1. That a married woman is not at law liable upon any contracts made or any debts incurred by her prior to the passing of the Married Women's Property of 1872, she being a married woman at the time of making such contracts, or incurring such debts, even though they be her separate contracts or debts, the said Act not being retrospective in its effect. 2. That the replication professes to answer the whole of the sixth plea of the defendant, whereas it at most answers only a part of the plea. 3. That the replication is a departure.

Ferguson, for the demurrer. The question here is, whether the Married Women's Act of 1872 is retrospective. *Merrick v. Sherwood*, 22 C. P. 467, has decided it to be so, but that decision was not unanimous, and it is submitted that it is not law. The Act gives a new right to sue, and therefore should be construed as only coming into force as to debts and contracts subsequent to the Act. Every one who does an act does so with reference to the laws as they exist at the time. He referred to *Kraemer v. Gless*, 10 C. P. 470; *Wright v. Garden et ux.*, 28 U. C. R. 609; *Dingman v. Austin*, 33 U. C. R. 190; *Broom's Leg. Max.*, 5th ed., 34; *Moon v. Durden*, 2 Ex. 22; *McDonald v. McDonald*, 14 Grant 133; *Bank of Montreal v. Scott et al.*, 17 C. P. 358.

Harrison, Q. C., contra, relied on *Merrick v. Sherwood*, 22 C. P. 467, and cited also *Kraemer v. Gless*, 10 C. P. 470; *Emerson v. Clayton*, 32 Ill. 493; *Chicago, Burlington and Quincy R. R. Co. v. Dunn*, 52 Ill. 260; S. C. 4 Am. Rep. 606.

RICHARDS, C. J., delivered the judgment of the Court.

Mr. Ferguson admitted that the replication demurred to brought the case within the rule laid down in *Merrick v. Sherwood*, 22 C. P. 467. He contended, however, that the right conferred under the statute there referred to was a new right to sue a married woman, to proceed against her personally; it was not a mere question of procedure, to enable a party having a claim against a married woman, who had a separate estate to sue her at law instead of in equity. The course pursued in such a case in England before the passing of the Married Woman's Act, was to proceed against her separate property, and not against herself personally. Our statute enables *the married woman* to be sued, and ought to be construed as an ordinary statute giving a new right, and only to apply to debts contracted after the passing of the Act.

In a case like this, I think we ought to follow the decision of the Court of Common Pleas on the express point.

Admitting the mode of procedure referred to by Mr. Ferguson to have been in practice here and in England, as to reaching the separate property of a married woman to satisfy her separate debts; still, the new provision merely suggests another mode of recovering her separate debt from her separate property.

It is true that there may be in law a further procedure against her person, which could not be had in equity on a debt contracted against her individual property. But suppose she had committed a tort before the passing of the Act, and after her marriage, her husband would be joined in an action against her brought before the passing of the Act, but her property would have been first liable to pay the judgment. It would seem, in such a case, that all the last statute authorized was, that she might be proceeded against separately from her husband for the tort, whereas before the Act the husband and wife were required to be joined.

The very words of the clause, sec. 9, seem to shew it a matter of procedure, for it says she may be "sued or proceeded against sepaartely from her husband in respect

of any of her separate debts, engagements, contracts, or torts, as if she were unmarried."

We think we ought to follow the decision of the Court of Common Pleas, and that the plaintiff is entitled to judgment on demurrer to the replication.

Judgment for plaintiff.

J. K. ALEXANDER (Administrator of W. J. Alexander,) v.
TORONTO AND NIPISSING RAILWAY COMPANY.

R. W. Co.—Accident through negligence—Contract limiting liability.

Declaration, under C. S. U. C. ch. 78, by the administrator of A., alleging that A. was lawfully on the platform at a station on defendants' railway, and defendants so negligently managed and drove an engine and carriages, loaded with timber, along the line near said station that a piece of timber, projecting from said carriages, struck and killed the said A.

Plea, that A. was a newsboy in the employ of C. & Co., vending papers on defendants' trains, under an agreement between C. & Co. and defendants, which agreement provided that defendants should carry C. & Co., their newsboys and agents, on their trains, and should not be liable for any injury to the persons or property of said C. & Co., their newsboys or agents, whether occasioned by defendants' negligence or otherwise.

Held, plea good, without alleging that A. was a party to or aware of the agreement.

Quære, if such a contract is to be considered as made with the person carried, and if so, as to the effect of his being an infant.

DEMURRER. Declaration, under the Consol. Stat. C. ch. 78, by the plaintiff as administrator of William James Alexander; for that the defendants before and at the time of the committing the grievances herein set forth were carriers of passengers for hire from Unionville to Toronto, in carriages upon a railway, and were possessed of and used a certain railway and a certain station at Unionville aforesaid, on the said railway, for the reception and accommodation of their passengers, and the said station was then in the possession of and under the management of the defendants for the purposes aforesaid; and the said W. J. A. in his lifetime, at the time of the committing of the said grievances, was lawfully using the platform of the said station; and the defendants, by their servants, so negligently and unskillfully managed and drove a certain

engine and carriages along their said railway, whereon was loaded certain wood and timber, that by reason of the said negligence a certain piece of wood then being on one of the said carriages projected over the said platform, and struck the said W. J. A., then lawfully being on the said platform as aforesaid, whereby the said W. J. A. was wounded and injured, and by reason of the said engines the said W. J. A. afterwards, and within twelve calendar months next before the commencement of this action, died, &c.

Pleas,—1. Not guilty. 2. That the said W. J. A. was not lawfully using the platform of the said station as alleged. 3. that the said W. J. A. was in the employment of Colin R. Chisholm, Hugh J. Chisholm, and Alexander Chisholm, as a newsboy, vending papers and books on the railway trains of the defendants, under and by virtue of an agreement made and entered into by and between the said Chisholms and the defendants, in and by which agreement it was and is provided that the defendants should carry the said Chisholms, their agents and newsboys, on the said trains, and should not be liable or responsible for any injury to the person, or for any loss or injury to the property of the said Chisholms, their newsboys or agents, from any accident happening to them, the said Chisholms, or their said newsboys or agents, whether such accident should arise or be occasioned by the wilful default, misconduct or negligence of the defendants, or of any of their servants, or from any other cause whatever. And the defendants further say, that at the time of the committing of the grievances in the declaration alleged the said W. J. A. was the newsboy and servant of the said Chisholms engaged in the discharge of his duties as such newsboy, and was then upon the said train and said platform under and by virtue of the said agreement, and he was injured and killed by reason of an accident happening as in the declaration alleged, and for which, by reason of said agreement, the defendants are not liable or responsible.

Demurrer to the third plea, on the grounds,—1. That the contract or agreement set out in the plea is no answer to

the present action, it not being alleged that the plaintiff or the said W. J. A. was a party to the said contract, or in any way assented to the same. 2. That the declaration discloses a cause of action independent of contract, and the plea is only an answer to a tort founded on contract. 3. That any contract made between the said Chisholms and the defendants could not be binding on the plaintiff in this action. 4. That the agreement set out in the plea, in so far as it seeks to relieve the defendants from liability for any loss or injury occasioned by their own negligence and wilful default, is unreasonable and not binding on the plaintiff.

Joinder.

Harrison, Q. C., for the demurrer. The plea is bad, because it assumes that the declaration is grounded on the implied contract that a railway company is to carry safely. It is in no sense so grounded, but is founded on negligence, and properly so: *Grieve v. Ontario and St. Lawrence Steamboat Co.*, 4 C. P. 387; *Kearney v. London, Brighton, and South Coast R. W. Co.*, L. R. 5 Q. B. 411. If the deceased had been injured only, he would have had the right of action in himself; as he was killed, the right of action was in the administrator: *Gladwell v. Steggall*, 5 Bing. N. C. 733; *Pearcy v. London, Brighton and South Coast Railway Co.*, 5 Ex. 787; *Marshall v. York, Newcastle and Berwick Railway Co.*, 11 C. B. 655; *Collett v. London and North Western R. W. Co.*, 16 Q. B. 984; *Austin v. Great Western R. W. Co.*, 16 L. T. N. S. 320; *Philadelphia and Reading R. W. Co. v. Derby*, 14 How. 468; *Osborn v. Gillett*, L. R. 8 Ex. 88.

M. C. Cameron, Q. C., contra. The vital distinction between the present and the cases cited is, that in none of those cases was it averred that there was an agreement that there should be no compensation for injuries during carriage under the agreement. That is distinctly shewn here. He cited *Sutherland v. Great Western R. W. Co.*, 17 C. P. 409; *Degg v. The Midland R. W. Co.*, 1 H. & N. 773; *Shaw v. York and North Midland R. W. Co.*, 13 Q. B. 347, 353

RICHARDS, C. J., delivered the judgment of the Court.

The authorities cited on the argument seem to shew that the defendants would have been liable to an action at the suit of the party killed, if he had survived, on a declaration framed charging the defendants as liable, as a matter of duty, to carry him safely. It is equally clear, if he had himself obtained a ticket from the Company, by which he was to be carried on the agreement referred to in the plea, that he could not maintain the action if he had only been injured, and were bringing the action in his own name.

We have not been referred to any English cases which decide the point now raised.

The plea, in effect, sets up that the person killed was carried under a contract made by his employers which was conditional, and which relieved the defendants from the common law liability to carry safely and securely.

The first exception to the plea is, that it is not alleged that the person killed was a party to the contract, or was in any way made aware of its effect. If it required an express agreement or assent on the part of the plaintiff's son to relieve the defendants from [their liability, it certainly is not averred in the plea that he made such agreement. If his employers sent him to be carried on the defendants' railway, on terms which relieved the Company from liability for their negligence, perhaps he might have had a remedy against them.

It seems difficult to maintain that this action will lie when the person was carried on a contract which relieved the defendants from liability.

In the case of *Alton et al. v. Midland R. W. Co.*, 19 C. B. N. S. 213, very many cases are referred to, and in that case the declaration proceeded on the ground that the party killed was, as a matter of duty, to be safely carried. The defendants pleaded that the party was carried under a contract not made with the plaintiff, and that merely substituting an action in the form of case for one of contract would not create on the defendants' part a greater liability than arose under the contract.

There the action was brought by the master for damages occasioned by the death of the servant. The Company pleaded that they carried the servant under a contract with him, and therefore the master could not say that they had tortiously killed his servant, so as to give him an action in tort, when there was a contract to carry with the servant. The case, of course, is not identical, but many of the railway cases are referred to, and the mode in which the defence is set up is similar to the case before us.

If any presumption is to arise in this matter, it would seem more reasonable that the plaintiff's son should have known the contract and terms on which he was carried, than that he should not. If he wished to protect himself he should have stipulated with his employers that he would not become a passenger with defendants on the terms of the contract which his employers had made. If asked for his fare, and he said he was sent there by the Messrs. Chisholm under their agreement with the Company, defendants could only assume he travelled on the terms of their agreement with his employers.

It may be that the bare fact of being lawfully on the defendants' train raises the obligation to carry a passenger safely, though the contract on which he is carried, and which makes his being on the train lawful, stipulates that the Company are not to be liable for accidents occurring during the journey. If this be so, I have not met with any decisions going that length.

If the carrying of a passenger creates a greater liability on the Company than carrying freight, and of such a character that the party who makes the contract and sends his servant to be carried under it cannot limit the liability of the Company, then of course the plea of the defendants may be considered defective.

If the contract is to be considered as one made with the passenger himself, though travelling on an agreement made with his employer, and that such passenger agreed to release the railway from all claims for accident, as a substantive agreement of his own, then railway companies can

never carry an infant, nor the property of an infant, at the diminished fares on which other persons and property may pass over their lines.

The question is not directly raised by these pleadings, that the contract was in effect made with the party killed, and he was an infant, and that though agreeing to the terms of the contract, yet being an infant he was not bound by that agreement.

As far as the authorities cited go, or I have been yet able to explore the law, I think we must hold the plea demurred to good.

Judgment for defendants (a).

TIGHE V. WICKS.

Slander—Demurrer—Special damages.

Declaration.—That the plaintiff was and is a clergyman of the Church of England, and that the defendant falsely and maliciously spoke and published of him in relation to his said profession, “He will get drunk: I have seen him drunk,” meaning thereby that the plaintiff was an unfit and improper person to exercise his said calling, whereby the plaintiff was injured in his good name, &c., and shunned by divers persons—without any averment of special damage:

Held, on demurrer, declaration bad.

DEMURRER. Declaration—That the plaintiff was and still is a clergyman of the Church of England, and hath always exercised and followed his said profession or calling with integrity, credit, and reputation; and the defendant falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in relation to his said profession or calling, and the exercising and following thereof by him, the following, that is to say: “He,” (meaning the plaintiff) “will get drunk: I have seen him drunk,” meaning thereby that the plaintiff was an unfit and improper person to exercise or follow his said profession or calling; whereby the plaintiff was injured in his good name, credit, and reputation, and brought into public

(a) This case has been argued in the Court of Appeal, and stands for judgment.

scandal and disgrace, and hath been and is shunned and avoided by divers persons, and otherwise injured.

Demurrer, on the grounds,—1. That the words charged are not actionable without special damage.

2. That it is not shewn that the plaintiff at the time of the alleged grievances was a beneficed clergyman of the Church of England, or was in the actual receipt of professional temporal emolument, or held any office of temporal pecuniary profit, or was in the receipt of any emoluments as a clergyman of the Church of England.

3. That it is not shewn that the offence charged by the said words would have caused the plaintiff to lose any benefice, office, or emoluments, or that any person had power, in consequence of the offence charged, to deprive the plaintiff of any benefice, office, or emoluments, or that the offence charged would be sufficient cause for such deprivation.

4. That it is not shewn that any emoluments or pecuniary benefit of or to the plaintiff, as a clergyman of the Church of England, depended on his reputation for sobriety, or should be diminished by reputed insobriety.

5. That the said words do not charge the plaintiff with insobriety while performing any of the duties of the profession, office, or calling of a clergyman of the Church of England, or convey any imputation upon his conduct in his profession or calling, or in any way in connection therewith.

6. That it is not shewn in what manner the defendant connected the alleged insobriety of the plaintiff with his profession or calling as a clergyman of the Church of England.

7. That it is not shewn when, or to whom, or in whose presence or hearing the said words were spoken.

Joinder.

Harrison, Q. C., argued the demurrer for the defendant during this term. It is not shewn, as it should be, that the words spoken necessarily relate to the plaintiff in his profession: *Starr v. Gardner*, 6 O.S. 512; *Galwey v. Marshall*, 9 Ex. 294. Actual damage should be shewn: *Irwin v.*

Brandwood et ux., 2 H. & C. 960 ; *Hartley v. Herring*, 8 T. R. 130 ; *Breeze v. Sails*, 23 U. C. R. 94. It should be shewn in what manner the words apply : *Ayre v. Craven*, 2 A. & E. 2, following *Lumbey v. Allday*, 1 Cr. & J. 301 ; *Doyley v. Roberts*, 3 Bing. N. C. 835 ; *James v. Brook*, 9 Q. B. 7 ; *Hopwood v. Thorn*, 8 C. B. 293 : *Pemberton v. Colls*, 10 Q. B. 461 ; *Paterson v. Collins*, 11 U. C. R. 63 ; *Walker v. Brogden*, 19 C. B. N. S. 75 ; *Foulger v. Newcomb*, L. R. 2 Ex. 327.

C. S. Patterson, Q. C., contra. The doctrine does not seem clear in the cases cited. There seems to be no good reason why special damage might not be inferred from words which would prevent a clergyman obtaining a benefice, as well as from words which would have a tendency to make him lose it. The rule, taking the reason of it, should not be confined ; to make it intelligible it should be extended. [RICHARDS, C. J.—You do not expect us to extend the rule as to verbal slander.] No ! but to give a liberal interpretation to the rule as it stands : *Pemberton v. Colls*, 10 Q. B. 461, is in point, and in plaintiff's favor. The declaration is sufficient if "will get drunk" means what the inuendo says it does. What it does mean is a question of fact. *Breeze v. Sails*, 23 U. C. R. 94, and *Hopwood v. Thorn*, 8 C. B. 293, are distinguishable.

MORRISON, J., delivered the judgment of the Court.

In this case our judgment must be for the defendant on the demurrer.

The case of *Breeze v. Sails*, 23 U. C. R. 94, is an authority in favor of the defendant. That case was one very similar to this. There the declaration set out that the plaintiff was and continued to be a preacher in a certain sect, &c., known as Methodists, and was in the receipt of temporal emoluments as such preacher ; yet the defendant contriving, &c., to injure the plaintiff, and to bring him into public scandal and disgrace, and to cause him to be believed to have been guilty of fornication, and to cause him to be deprived of his office as preacher, and of the

emoluments therefrom derived, falsely and maliciously spoke and published of the plaintiff, in his character as such preacher, the words following: "He," (meaning the plaintiff), "kept company with a prostitute; and I can prove it." The declaration was demurred to, and it was held bad.

Hagarty, J., who delivered the judgment of the Court, said: "We think the declaration cannot be supported, at all events without an averment of special damage." He referred to *Hopwood v. Thorn*, 8 C. B. 314, and the judgment of Wilde, C. J., therein, and also to *Cox v. Cooper*, 9 L. T. N. S. 329, as to the averments necessary where the words are not in themselves actionable.

In a late case, *Foulger v. Newcomb*, L. R. 2 Ex. 327, Channel, B., who delivered the judgment of the Court, said, at p. 330, "One essential ingredient of a good cause of action for defamation, is damage;" and after referring to the rules as to the damage necessary to constitute a good cause of action, he says, "Where words are spoken which are of a defamatory nature, yet such that the law will not imply damage from them, still they are actionable if they are shewn actually to cause, (as their legal and natural consequence,) damage of a character which the law will recognise. In order that the rule as to slander of a man in his business may apply, it is necessary that the words (being capable of having reference to the business) should in fact be spoken of him in respect of his business. * * Next, it must appear that they tend to prejudice him in that business."

The words in the declaration are merely, "He will get drunk; I have seen him drunk." Now these words are applicable as well to a person not a clergyman as to a clergyman, and cannot be actionable as referable to the plaintiff's profession, and they are not actionable in themselves.

Judgment for defendant.

ALLAN V. GREAT WESTERN RAILWAY COMPANY.

“*The Railway Act, 1868*,” sec. 20, sub-sec. 4, D—34 Vic. ch. 43, sec. 5—
Negligence in carriage of goods.

Sub-sec. 4, of sec. 20, of “*The Railway Act*,” 1868, D., gives an action against certain railway companies for neglect to carry goods, &c., &c., but the Act does not apply to the Great Western Railway Co., the defendants. By sec. 5 of 34 Vic., ch. 43, D., this sub-section “is hereby amended by adding thereto the following words:” From which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants”; and by sec. 7, “The provisions of this Act” are made applicable to every railway company. *Held*, that the sub-section of the earlier Act, as thus amended, did not apply to defendants; but that the effect of the later Act was merely to add the newly enacted words to the sub-section, and “The provisions of this Act,” therefore did not include the amendment.

To a declaration for breach of contract to carry goods within a time agreed on, or within a reasonable time, from G. to B., defendants pleaded setting up a special condition of the contract, that defendants “should not be liable under any circumstances for loss of market or other claims arising from delay or detention of any train, whether at starting or any of the stations, or in the course of the journey, nor for damages occasioned by delays from storms,” &c.

Replication, that the damages sued for arose from negligence and omission of the defendants and their servants within the Railway Act of 1868, sec. 20, sub-sec. 4, D., as amended by 34 Vic. ch. 43, sec. 5, D., in this, that the car in which the goods were placed was negligently allowed to remain at a station unattached to any train, and was negligently attached to a train on a different branch of defendants’ railway from that between G. & B., and was carried thereon to W., at a distance from B., and allowed to remain there a long time.

Held, on demurrer, replication bad, for it was not a traverse of the plea, but the allegation of negligence was dependent upon the previous reference to and reliance on the Statute.

Quære, whether the replication of negligence alone would have been an answer to the plea, independent of the Statute.

DEMURRER. Declaration, first count, on a contract to carry goods in a reasonable time. Second count, in tort for non-carriage of goods. As to these counts the plaintiff entered a *nolle prosequi*.

Third count: That in consideration that the plaintiff would deliver to the defendants, as and being carriers of goods for hire, certain goods of the plaintiff to be by the defendants carried from Guelph to Brantford, and there delivered for the plaintiff for reward to the defendants, subject to certain conditions endorsed on a receipt then

given to the said plaintiff by the said defendants, the defendants promised the plaintiff to carry the said goods from Guelph to Brantford aforesaid, and there deliver the same for the plaintiff within a reasonable time, subject to the conditions endorsed upon the said receipt; and the plaintiff delivered and the defendants received the said goods for the purpose and on the terms aforesaid, and all conditions endorsed on said receipt and all other conditions were performed, &c., and all times elapsed, necessary to entitle the plaintiff to have the said goods carried and delivered as aforesaid; yet the defendants did not carry and deliver the said goods for the plaintiff within a reasonable time, whereby, &c.

Fourth count: That the plaintiff, before the making of the promise hereinafter mentioned, was the owner of certain goods then being in Guelph, which said goods the plaintiff was desirous of offering for sale and selling by public auction in Brantford, on the 25th of January, 1873, and thereupon the defendants, in consideration that the plaintiff would deliver the said goods to the defendants as and being carriers of goods for hire, to be by them carried from Guelph to Brantford, and there delivered for the plaintiff, for reward to the defendants, the defendants promised the plaintiff, for a reasonable reward in that behalf, to carry the said goods from Guelph to Brantford upon and by the first train of the defendants which should leave Guelph after the delivery of the said goods to the said defendants, and there deliver the same for the plaintiff within a reasonable time, and so that in the course of such carriage the said goods should be carried to Brantford before the said 25th day of January. And the plaintiff delivered the said goods to the defendants, and the defendants received the same for the purpose and on the terms aforesaid, and though a reasonable time had elapsed, &c., to have the said goods carried and delivered for the plaintiff before the said 25th day of January as aforesaid, yet the defendants did not carry the said goods by and upon the first train of the defendants leaving Guelph after the

delivery thereof to said defendants, nor carry nor deliver the same to the plaintiff within a reasonable time, nor before the said 25th day of January, 1873, but failed so to do—whereby the said plaintiff was deprived of the said goods for a long time, and lost divers gains, &c., and the benefit of the expense incurred in preparing to sell the said goods by public auction, and was otherwise greatly damaged.

Plea to 1st, 2nd, 3rd, and 4th counts: That before the said goods were delivered to or received by the defendants, the plaintiff signed and delivered to the defendants a request, partly written and partly printed, by which the plaintiff requested the defendants to receive the said goods under and upon the conditions stated upon the back of the said request, to send the same from Guelph to Brantford: that one of the said conditions was, that the company (meaning thereby the defendants) should not under any circumstances be liable for loss of market or other claims arising from delay or detention of any train, whether at starting or at any of the stations, or in the course of the journey, nor for damages occasioned by delays from storms, accidents, or unavoidable causes, or for damages from weather, fire, heat, frost, or delay of perishable articles, or from civil commotion: that at the said request, and upon the said conditions, the defendants received the said goods, and thereupon gave the plaintiff a receipt in writing, in which they stated that they did accept and receive the said goods to be sent to Brantford aforesaid, under the conditions stated upon the other side of the said receipt, which conditions were identical with the conditions above mentioned, and upon which the plaintiff so requested to accept and send the said goods, and the defendants upon the said terms and conditions, and no other, received the said goods to be sent as aforesaid, of all which at the time of the delivery of the said goods the plaintiff had due notice; and the said goods were sent by defendants upon and according to the said special contract, terms and conditions; and that the delay and damage complained of arose

from delay and detention of the train by and upon which the said goods were sent as aforesaid, and within the terms and meaning of the said conditions.

Replication. That the defendants before and at the time of the passing of the Acts of Parliament of the Dominion of Canada hereinafter mentioned, were and are subject to the legislative authority of the Parliament of the said Dominion of Canada: that the said Acts were passed before the making of the promise by the defendants in the declaration alleged, and that the defendants ought not, by reason of anything in the said plea contained, to be relieved from the plaintiff's action, because he says that the damage in respect to which the plaintiff sues arose from negligence and omission of the defendants and their servants, within the true intent and meaning of sub-section 4, of sec. 20, of "*The Railway Act, 1868*," passed by the Parliament of the Dominion of Canada, as amended by sec. 5, of 34 Vic., ch. 43, of the Acts of the said Parliament, in this, that the goods in the several counts of the declaration mentioned were after the delivery of the same by the plaintiff to the defendants, as in the said declaration alleged, placed by the servants of the defendants in a car to be carried from Guelph to Brantford, attached to a train of the defendants, to be drawn on and along a line of railway of the defendants: that the said car containing the said goods was detached from the said trains, and for a long and unreasonable time was negligently permitted by the servants of the defendants to be and remain detached from any train, and to be and remain stationed at a station of the defendants, at the village of Harrisburg, on the said line of railway, and was negligently, by the servants of the defendants, permitted to be attached to another train of the defendants, and drawn on and along another branch of the defendants' railway to the town of Woodstock, not on the line of said railway between Guelph and Brantford, but a long distance therefrom, and to remain at the said town of Woodstock a long time, which was the cause of the breach by the defendants

of the promise of the defendants in the said declaration alleged.

Demurrer to the replication, on the grounds: 1. That the replication is a departure from the declaration, the declaration being in contract, and the replication charging negligence and being in tort. 2. The plaintiff having alleged a breach of contract, the defendants are not prevented by any Act of Parliament from shewing what the terms of the contract were. 3. That it is no answer to a plea of fulfilment of contract, in an action on contract, to aver that the breach of contract in the declaration mentioned arose from negligence or omission, or to state matter in aggravation of damages.

Joinder.

M. C. Cameron, Q. C., for the defendants. The two Acts which have to be considered are, the Dominion Act, 31 Vic. ch. 68, known as "*The Railway Act, 1868*," and the Dominion Act, 34 Vic. ch. 43. The first Act in its first part applies to railways thereafter to be constructed under the authority of the Parliament of Canada, and to the Intercolonial Railway, so far as may not be inconsistent with the special Act; and in its second part, to railways in course of construction by the Government of Canada, to all railways thereafter constructed under the authority of the Parliament of Canada, to all companies thereafter incorporated for their construction and working, and to the Intercolonial Railway so far as may not be inconsistent with the special Act respecting it. It does not therefore apply in any way whatever to the defendants, unless it be by virtue of the 7th section of 34 Victoria, ch. 43, which is as follows:—"The provisions of this Act shall apply to every railway company heretofore, or which may be hereafter incorporated, and to every railway heretofore constructed, or now in course of construction, or hereafter to be constructed, as well as to those railways and railway companies to which the said *The Railway Act, 1868*, is by its provisions declared to be applicable." The question is, what

are "the provisions of this Act"? It is said that sub-sec. 4 of sec. 20 of the Railway Act, 1868, is made a part of the Act of 1871, because sec. 5 of the latter Act is expressed as follows: "Sub-section four of section twenty of the Railway Act, 1868, is hereby amended by adding thereto, after the word 'Company' therein, the following words: 'From which action the Company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the Company or of its servants.'" The sub-sec. 4 of sec. 20 of the Act of 1868 is as follows: "The party aggrieved by any neglect or refusal in the premises, shall have an action therefor against the Company." The amendment made by the Act of 1871, became a part of the Act of 1868; the sub-section of the Act of 1868 was not brought down and enacted as a part of 1871, which is the contention of the plaintiff. If the plaintiff meant to charge the defendants with negligence, he should have done so in his declaration. Instead of doing so, he has declared in contract, and in answer to the conditions of the contract relied on by the defendants by way of plea, he has replied the negligence of the defendants, which he says, by the Act of 1871, prevents the defendants from being relieved by the condition they have pleaded. The replication is a departure.

If sec. 20 of the Act of 1868 does apply, still it contains nothing about carrying goods in any specified time, either a reasonable time or by the next train after the delivery of the goods, and so the statute is no bar to the defendants stipulating with respect to the time for the carriage of the goods upon such terms as they choose. If that section of the Act of 1868 does apply, it is inoperative, for it is an interference with the civil rights of the defendants, and in violation of the British North America Act.

Harrison, Q. C., contra. The replication is not a departure. It shews matter which prevents the defendants from setting up the conditions in their plea, and it affords a good answer to the allegations of the plea. The plea relies on a condition which relates to a delay of trains, and

not delay generally : *Devlin v. Grand Trunk R. W. Co.*, 30 U. C. R. 537. And the replication shews there was no delay of trains, but a delay generally, by reason of the car in which the plaintiff's goods were being taken from the train of which it formed a part, and left not attached to any train. As to departure : see *Smith v. Commercial Union Assurance Co.*, 33 U. C. R. 69 ; *Brine v. Great Western R. W. Co.*, 2 B. & S. 402.

The Act of 1871 applies to every railway company. Sec. 5 must therefore apply to the defendants, which is all the plaintiff contends. And sec. 5 remains a part of the Act of 1871, and is not transferred out of it into the Act of 1868. The defendants are a Company within the sole control and jurisdiction of the Dominion Parliament. The legislation therefore which does affect their civil rights is right and lawful ; and besides this objection is not open to the defendants, as they have not specified it as a cause of demurrer. The Imperial Act 17 & 18 Vic. ch. 31, sec. 7, is the provision which the Act of 1871, has adopted. The following cases refer to negligence of railway companies, and to the effect of their conditions, whether they are considered to be reasonable or not according to the statute : *Tattan v. Great Western R. W. Co.*, 2 E. & E. 844 ; *Simons v. Great Western R. W. Co.*, 18 C. B. 805 ; *Peek v. North Staffordshire R. W. Co.*, 9 Jur. N. S. 914 ; S. C. 10 H. L. Cas. 473 ; *Harrison v. London, Brighton, and South Coast R. W. Co.*, 2 B. & S. 122 ; *Gregory v. West Midland R. W. Co.*, 2 H. & C. 944 ; *Booth v. North Eastern R. W. Co.*, L. R. 2 Ex. 173 ; *Allday v. Great Western R. W. Co.*, 5 B. & S. 903.

Cameron, Q. C., in reply. The Act of 1868 does not apply to mere delay in carrying goods from any cause, but to not carrying at all, which is not the complaint here. The action is on the contract for not carrying in time, and there is a plain departure in the replication.

WILSON, J.—I may say I have no doubt that the 5th section of the Act of 1871 merely adds the newly enacted words to sub-sec. 4 of sec. 20 of the Act of 1868.

The language is, that the previous Act "is hereby amended by adding thereto," that is, placing *in the Act of 1868* words not before there, and not bringing down that solitary sub-section into the new Act.

"The provisions of this Act," mentioned in sec. 7 of the later Act, do not therefore include the amendment made by the fifth section to the former Act.

It is as if it had been declared that the clause, as amended, should be considered as if it had been embodied in the former Act, and was to be read as if it had been originally contained therein. And the same as when the Act of 1868 declares that it shall "be incorporated with the special Act, form part thereof, and be construed therewith as forming one Act."

But when statutes are *in pari materia* they are so to be read, although it is not said they are to be read as one Act: *Waterlow et al. v. Dobson*, 27 L.J.Q.B. 55, per Lord Campbell.

The other matters need not be considered, as, on the ground stated, we must hold the replication in substance to be bad.

The replication does not contain a traverse of the plea. It alleges that the defendants were guilty of negligence, within the meaning of the statute, in this, that the car containing the goods was detached, &c., shewing how the negligence alluded to arose, so as to make it apparent there was negligence; but the whole of that allegation is dependent on the previous reliance upon, and reference to, the statute.

If the plaintiff wish to reply the facts in the latter part of his replication as a substantive answer to the plea, independently of the statute, he may do so. The cases referred to on the argument, and also the cases of *Czech v. General Steam Navigation Co.*, L. R. 3 C. P. 14, and *Ohrloff et al. v. Briscall et al.*, L. R. 1 P. C. 231, are cases favourable for the plaintiff.

MORRISON, J., concurred.

RICHARDS, C. J., was not present during the argument, and took no part in the judgment.

Judgment for defendants. (a)

(a) See *Scott v. G. W. Ry. Co.* 23 C. P. 115, where the same point as to the construction of the Statute is decided.

HALL V. EWART.

Navigable river—Obstruction—Notice to remove—Pleading.

Declaration: that the plaintiff's vessel was lying almost loaded at the railway wharf at Toronto near the mouth of the river Don, with a tug to tow it into the harbour, and before the loading could be finished and the vessel towed out, the defendant's vessel came into the harbour and near the mouth of the river: that the entrance to the dock where plaintiff's vessel lay was narrow, and not wide enough to allow plaintiff's vessel to pass defendant's vessel, if the latter entered the mouth of the river before the other went out, of which defendant had notice; and as defendant was about to enter the river plaintiff gave him notice that the river was too narrow, that the plaintiff's vessel was nearly loaded, and defendant would be delayed only a short time if he waited until plaintiff's vessel passed out: that defendant refused to listen to the warning and remonstrance of the plaintiff, and wrongfully and injuriously brought his vessel into the Don, and kept it there three days after plaintiff's vessel was loaded, and the plaintiff, though ready to proceed with his vessel, was kept there that time idle, and was put to great loss and expense; and further, that defendant so delayed the plaintiff unnecessarily, and was during said time unable to load his (defendant's) vessel, and such delay was caused solely by the wilful and unnecessary act of defendant and his servants, from which defendant could reap no advantage.

Held, declaration bad, for want of an averment of the plaintiff's right to use the *locus in quo*, or that it was a navigable stream, and because it failed to shew an unreasonable obstruction of the stream after the defendant knew that the plaintiff had his vessel loaded, and required him to remove the obstruction to enable him to pass out.

DECLARATION: That the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was the owner of a schooner called the "Andrew Stevens," and a tug used in hauling the same, called the "W. T. Robb," and the said schooner and tug were at the said time lawfully lying alongside of the Toronto and Nipissing Railway and Grand Trunk Railway dock at the port of Toronto, at the mouth of the river Don, where the said river empties into the bay and harbour of Toronto, and were then loading the schooner with lumber which had been placed on the dock, and which the plaintiff, as owner of the schooner, was under contract to carry from the said dock to Kingston. And while the schooner and tug were lying at said dock, and before the schooner had been completely loaded, and while said schooner and tug were lawfully lying at the mouth of the said river Don in the said har-

bour, and before a reasonable time had elapsed to enable the plaintiff's said schooner and tug to leave the said dock, and to be removed out of the said river Don, a certain vessel of the defendant called the "Antelope," of which the defendant was before and at the time of the committing of the said grievances the owner, came into the harbour of Toronto, and near the mouth of the said river Don. That the entrance to the said dock at which the said schooner of the plaintiff was then lying for the purpose of being loaded was narrow, and not of sufficient width to enable the plaintiff's said schooner to pass the vessel of the defendant, if the said vessel of the defendant had entered the mouth of the said river before the said schooner and tug of the plaintiff had been taken and removed from the said dock, and out of the said river—of all which the defendant, his agents, and the captain of defendant's vessel, had notice. And the plaintiff further saith, that as the said vessel of the defendant was about to enter the said river the plaintiff warned and gave notice to defendant, and to the master of said vessel, that the mouth of the said river Don was too narrow to permit the plaintiff's schooner passing out while defendant's vessel was in the said river Don; and the plaintiff then further informed the defendant and the master of defendant's vessel that the plaintiff's schooner was just about loaded, and that the defendant would be delayed but a very short time if his vessel waited at the mouth of the Don until the plaintiff's schooner had been loaded and the said schooner and tug had passed out of the said river: that the defendant, by his captain and master in charge of the said vessel of the defendant, refused to listen to the warning and remonstrance of the plaintiff, and notwithstanding his request that the said vessel of the defendant would remain outside of the said river Don for a short time until the plaintiff's schooner was loaded, wrongfully and injuriously brought the defendant's said vessel within the mouth of the said river Don, and there kept the said vessel for a long space of time, to wit, three days, after the said schooner of the plaintiff had been loaded and ready to proceed on the

said voyage, during all which time the defendant hindered the plaintiff from removing and the plaintiff was unable to remove his said schooner from the said dock, and the plaintiff although ready to proceed on the voyage with his said tug and schooner as aforesaid, by reason of the said obstruction of the defendant's vessel was unable to proceed, and was kept during all that time in the said river lying idle at the said dock, and during all that time the plaintiff was put to great expense and trouble, and suffered great loss by reason of his said schooner and tug lying idle and being during all that time useless to him, and also lost great gains and profits which he otherwise would have made, and he was compelled to expend, and necessarily did expend, large sums of money in paying the wages of the master and sailors, and other servants, agents and workmen employed and engaged by him in the said schooner and tug, whose wages he was compelled to pay, and whom he was compelled to board during all that time. And the plaintiff further saith that the defendant entered the said river and delayed the plaintiff during all the said time unnecessarily, and without any advantage to the defendant, and that the defendant during all the time that he lay at the mouth of the said river Don, as aforesaid, was unable to load or unload his said vessel, and that the said obstruction and delay of the plaintiff's vessel as aforesaid was caused solely by the wilful act of the defendant, his servants and workmen, and by the master of his said vessel, and they were under no necessity to keep the said vessel in the said position, and they did not and could not during all the said time receive any benefit therefrom, and that during all the said time the said delay was of great injury to the plaintiff, and was of no advantage to the defendant, who caused the said delay wilfully, wrongfully, and negligently, and not in any way because it was necessary for him so to do. And all things happened, &c., necessary to entitle the plaintiff to bring this action. And the plaintiff has suffered damage by reason of the aforesaid wrongful acts of the defendant. And the plaintiff claims \$1000.

Demurrer, on the ground that the declaration discloses no cause of action against the defendant.

During this term the demurrer was argued. *Armour*, Q. C., for defendant. No cause of action is shewn. The *locus in quo* is not shewn to be a navigable river, nor is any unlawful obstruction shewn: *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316; *Ricket v. Metropolitan R. W. Co.*, L. R. 2 H. L. 175; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Hubert v. Groves*, 1 Esp., 148. There is neither any right shewn in the plaintiff, nor any duty cast upon defendant: *Collis v. Selden*, L. R. 3 C. P. 495; *Gantret v. Egerton*, L. R. 2 C. P. 371. He also referred to the Toronto Harbor Act, 13 & 14 Vic. ch. 80.

M. C. Cameron, Q. C., contra. It appears from the circumstances that this was a navigable river. The use of the words "bay," "dock," and "harbour," lead to the same conclusion. Like, therefore, a contract which would be void unless in writing, if it appear otherwise that it is in writing, it need not be averred. There is a sufficient allegation of damage to the plaintiff: *Green v. London General Omnibus Co. (Limited)*, 7 C. B. N. S. 290. Keeping the vessel idle is special damage: *Baird v. Wilson*, 22 C. P. 491.

RICHARDS, C. J., delivered the judgment of the Court.

It is not very clearly defined what the injury is that the plaintiff complains of. The effect of the allegations is, that his vessel was lying at the railway wharf near the mouth of the Don nearly loaded, with a tug to tow her out into the harbour, and before he had time to finish the loading of his vessel and tow her out of the mouth of the Don, defendant's vessel came into the harbour and near the mouth of the river: that the entrance to the dock at which plaintiff's schooner was lying was narrow, and not of sufficient width to enable plaintiff's schooner to pass defendant's vessel if she had entered the mouth of the river before plaintiff's schooner had been removed from the

dock and out of the river, of which defendant and his agents had notice; and as defendant's vessel was about to enter the river the plaintiff gave him notice that the mouth of the river was too small to permit plaintiff's schooner from passing out whilst defendant's vessel was in the Don; that the plaintiff's vessel was just about loaded, and defendant would be delayed but a very short time if he waited at the mouth of the Don until the schooner was loaded, and the schooner and tug had passed out of the river; that defendant refused to listen to the warning and remonstrance of the plaintiff, and notwithstanding his request, *wrongfully* and *injuriously* brought his vessel within the mouth of the Don, and there kept the said vessel for three days after the plaintiff's schooner was loaded and ready to proceed on her voyage, during all which time the defendant hindered the plaintiff from removing and the plaintiff was unable to remove his schooner from the dock, and the plaintiff, though ready to proceed on his voyage with his said tug and schooner, was in consequence unable to do so, and was kept during that time in the said river lying idle, and was put to great loss and expense, &c., and debarred of profits he would have made. And further, that defendant entered the river and delayed the plaintiff during all that time unnecessarily and without any advantage to himself, and during all the time was unable to load his own vessel, and that the obstruction and delay of the plaintiff's schooner was caused solely by the wilful act of the defendant and his servants, and they were under no necessity to keep the said vessel in the said position, and they could not receive any advantage therefrom; and during all that time the delay was a great injury to the plaintiff, and was of no advantage to the defendant, who caused the said delay wilfully, wrongfully, and negligently, and not in any way because it was necessary for him so to do.

The objection taken is, that it is not shewn that the plaintiff had any particular right or interest in the river Don, where the alleged nuisance is said to have been created by the defendant.

It is alleged that the plaintiff's vessel was alongside of the railways dock at the mouth of the river Don, where the said river empties into the bay and harbour of the city of Toronto. What was done by the defendant, that is complained of, was done in the river Don. If the plaintiff had any private or personal right or interest in the navigation of that river, he has not shewn it; and if it is a public navigable river and stream at the *locus in quo*, it ought to be alleged to shew his right.

The case of *Rose v. Miles*, 4 M. & Sel. 101, was an action brought against the defendant for mooring his barge so as to prevent, and preventing plaintiff from navigating the stream with his barges, whereby he sustained damage. In that action the plaintiff alleged he was navigating his laden barges along a certain *navigable* creek, part of a certain public river, situate in, &c. The Court there decided that the plaintiff shewed a particular damage, which entitled him to maintain the action.

No action could be maintained against the defendant for refusing to listen to plaintiff's remonstrance, as to bringing his vessel into the mouth of the Don, supposing it to be a navigable stream, which all the public are permitted to use. When he placed his vessel there the plaintiff was not using, and was not in a position to use, that part of the stream where the defendant's vessel was moored.

In the case of *Rex v. Russell et al.*, 6 B. & C. 566, an indictment for a nuisance in constructing geers in the river Tyne at Newcastle for loading coals, much valuable law is collected on the subject of the rights of persons navigating streams. In the judgment of Holroyd, J., at p. 586, he said: "For traffic there are rights, not only of navigation *sc. eundo et redeundo*, but *morando* (so far as necessary or reasonable) for loading and unloading, or for a wind, &c. The enjoyment of each of those rights by some is frequently and necessarily an obstruction to the free and complete enjoyment either of the same right, or of some other of the above rights in others; *ex. gr.* ships at anchor in the channel of the river, are an obstruction to ships sailing, &c. :

boats and wherries plying, keels lying in the river, are also an obstruction. But such obstruction is not necessarily, or as a matter of law, a public or a private nuisance. Each of the rights above mentioned must at times occasionally yield and become subordinate, as may be necessary or reasonable, at least in part, to some of the others. The public (that is, each individual,) has not an absolute right to navigate (*i.e.*, sail over,) every part of the river, but only where there is not otherwise a legal preoccupation (as in some cases there may be) by others. Ships in order to load, must lie, if not at the staiths, in the channel of the river with their loading keels. So in other trades, the ships lie at the wharves, or elsewhere, in the river or port, to load or unload, and their obstruction to others is or is not, as well as the erection of the wharf itself, a nuisance to the navigation, in like manner as the staiths or geers themselves in the coal trade are or are not a nuisance according to circumstances. Whether they are so or not is dependent upon circumstances; and is, therefore, according to Lord Hale, a question of fact for the jury."

The allegation, that the defendant kept his vessel in the stream after plaintiff's schooner was loaded, and obstructed the same, and prevented him from removing his schooner from the said dock, is not accompanied by any averment of knowledge on the part of the defendant that the plaintiff's schooner was loaded, and that he desired to proceed from the said dock, or of any notice given to him to that effect, with a request to remove the obstruction his vessel was unreasonably causing to his (plaintiff) navigating the stream.

It is suggested, in cases where a nuisance is merely continued and not created by a defendant, that before action is brought notice should be given, with a request to remove the nuisance.

Now here the obstruction of the stream by the defendant could only become a nuisance, as far as plaintiff was concerned, when he was in a position to use and desired to use the stream; and before defendant could be held

liable, he ought to receive notice that the plaintiff wished to use the stream ; and a request to that effect would be a prudent, if not a necessary, step to take.

I have looked at the statute 13 & 14 Vic., ch. 80. The Harbor Commissioners are authorized, amongst other things, to make by-laws for the government of all parties using the works and property vested in them, and of all vessels and floats coming into or using the said harbour of Toronto.

In practice, as the trade of the port increases, it will be found necessary, I apprehend, to pass by-laws by the Commissioners authorizing the appointment of a Harbor Master, whose directions as to how vessels shall be moored shall be followed, and then such difficulties as are suggested by this suit will not be likely to occur.

On the whole we think this declaration bad, on the two grounds to which we refer.

Much of the *matter* in the declaration seems to be calculated to excite our feelings against the defendant for the unreasonable omission on the part of his servants to listen to the warnings that were given them, and for their detention of plaintiff's schooner when it was of no benefit to the defendant, without quite shewing that what was done was *illegal*.

Judgment for defendant.

PARSONS V. GOODING ET AL. (Executors of John Bedford.)

Executors—Payment of debts—29 Vic. ch. 28, sec. 28.

Since the 29 V. ch. 28, s. 28, abolishing all distinction between the different classes of debts in the administration of an estate, it is no defence for an executor sued on a promissory note of his testator, that there are specialty debts unpaid more than equal to the goods not administered.

DEMURRER. Declaration on a promissory note dated 21st December, 1869, made by John Bedford, the defendants' testator, payable to George H. Parsons as executor of B. Parsons, or order, for \$600 on demand, endorsed to the plaintiff.

The defendants pleaded separately the following plea, that John Bedford, in his lifetime, by deed of the 14th of October, 1869, covenanted with the Trust and Loan Company of Upper Canada, to pay to them \$5,000; \$500 on the 1st days of October, in the years 1872, 1873, 1874, and 1875, and \$3,000 on the 1st of October, 1876, with interest at eight per centum per annum; and at the commencement of this suit, there was and still is due to the said Company on the covenant \$5,025 principal and interest. The plea set out also another covenant of the testator to pay to certain persons \$2,000 on the 16th of June, 1872, with interest at 10 per centum per annum, and that there was due upon it \$2,200 for principal and interest. The defendants then averred that they had fully administered all the personal estate and effects which were of the said John Bedford, and which had ever come to the hands of the defendants to be administered, except goods and chattels the value of which was not sufficient to satisfy the said specialty debts; and that they had no assets to be administered except the said goods and chattels, the value of which was not sufficient to satisfy the said specialty debts, and which were liable to satisfy the same.

The plaintiff demurred to the pleas, because each plea set up certain specialty debts as entitled to priority over the claim of the plaintiff, whereas by law no such priority exists. That the plea sets up as an answer to the whole of

the plaintiff's claim that which at most is only an answer to part of it : that under the law the plaintiff was entitled to share in or have his claim satisfied out of the assets which have come to the hands of the defendants *pari passu* with the debts in the plea mentioned. Joinder.

In this term *S. Richards*, Q. C., supported the demurrer. The 29 Vic. ch. 28, sec. 28, enacts that all debts, crown debts, debts due by judgment and specialty, and by simple contract, shall be paid *pari passu*, and without any preference or priority of one rank or nature over those of another, saving all liens existing during the lifetime of the testator or intestate. (a)

In *The Bank of British North America v. Mallory*, 17 Grant 102, judgment and execution creditors who had been paid by the sheriff on a sale of the lands of the deceased debtor were held liable to account to other unpaid judgment creditors of the deceased for their share of the assets, as on a *pro rata* distribution of the same under this statute. It is plain, therefore, that the pleas are bad. There may be a difficulty in administering an estate otherwise than in the Court of Chancery, but that can be no reason for setting up as a defence the priority of specialty debts which no longer exists. He referred to *Williams on Executors*, Edn. 930.

Spencer, contra. Admitting that the statute does away with the distinction between the different order of debts, still a creditor has no right to sue at law for his debt, if there is to be a distribution of the assets ; and there must be such distribution here : *B. & L. Prec.* 3rd ed. 579.

(a) The section is as follows : " On the administration of the estate of any person dying after the passing of this Act, in case of a deficiency of assets, debts due to the Crown and to the executor or administrator of the deceased person, and debts due to others, including therein respectively debts by judgment, decree or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute, are payable in like order of administration as simple contract debts—shall be paid *pari passu*, and without any preference or priority of debts of one rank or nature over those of another ; but nothing herein contained, shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate.

WILSON, J., delivered the judgment of the Court.

The statute has abolished all distinction between the different classes of debts for the purpose of their equitable and ratable payment. No priority, excepting to a certain extent in respect of crown debts, existed at the common law during the life-time of the debtor, and none now exists in any case after his death in the administration of his estate.

At the common law, the sheriff must pay the creditors according to the order in which their executions have come to his hands against a debtor who is living; and such payment, unless affected by insolvency proceedings, will stand; but as against a deceased debtor, although the sheriff may still be obliged to pay the creditors according to the priority of their executions, such payment is not final, for the whole of that payment must be accounted for in a general distribution under the Act, if an administration be sought for in Chancery.

The pleas afford no defence. They shew there are assets in which the plaintiff is entitled to participate equally with the specialty creditors named in the plea, and for whose debts the defendants claim the right to a priority of payment over the debt of the plaintiff.

And notwithstanding the statute, there is nothing to prevent the plaintiff from prosecuting his claim to a judgment, although it may be more beneficial to him in the end to have recourse to an administration suit.

Whether such a suit could be instituted in a Court of law under this section of the Act, is no part of our present enquiry. Such a proceeding has long been a common and a serviceable one in Chancery.

Judgment will be for the plaintiff.

Judgment for plaintiff.

RE MCKINNON AND THE CORPORATION OF THE VILLAGE OF
CALEDONIA.

Municipal Act of 1866, sec. 323, sub-secs. 1, 2—Closing road and granting it to R. W. Co.—Want of notice.

A village corporation passed a by-law to close a street and allow a railway company to appropriate it to build an embankment upon for railway purposes, without any notice to the applicant herein who had land on the street, or any notice as required by the Municipal Act of 1866, sec. 323, sub-secs. 1, 2. The street, however, had been only partially graded, and was scarcely fit for use, no one but the applicant seemed to have any cause of complaint, the injury to him was small, and the railway company had built their works upon the street at a large expense, and made openings for public traffic, and had opened another street in lieu of and as near as possible to the road so taken. Moreover the council had acted on decisions of this Court, and could probably do all that had been done by giving the notices and passing another by-law.

The Court under these circumstances refused to quash the by-law, but discharged the rule without costs.

Quære, per WILSON, J., as to the power of a Municipal Council to close up highways and grant them to a railway company, without notice.

On such an application the railway company should be made a party to the rule.

IN Michaelmas Term *Furlong* obtained a rule calling on the corporation to shew cause why by-law number 110 of the corporation, entitled "A by-law to provide for the carrying the Hamilton and Lake Erie Railway along certain streets in the Village of Caledonia, and for other purposes connected therewith," should not be quashed, on the grounds:—

1. That the by-law closes up a public road or highway, whereby the said Ranald McKinnon will be excluded from ingress and egress to and from his lands or place of residence over such road so closed by the by-law, contrary to sec. 320 of the Municipal Act.

2. That no written or printed notice of the by-law or the intended passing thereof had been posted up one month previously to the passing thereof, in six of the most public places in the immediate neighbourhood of the street proposed to be closed by the by-law, as required by sec. 323, sub-sec. 1, of the said Act, nor was any notice to the effect and purport of such notice given.

3. That no notice of the by-law, or the intended passing thereof, was published weekly, for four successive weeks, in

any newspaper published in the Municipality, or in any newspaper published in any neighbouring municipality, as required by sec. 323, sub-sec. 2 of the said Act, nor was any notice to the effect and purport of such notice given; and upon grounds disclosed in the affidavits and papers filed.

The by-law recited, that it was expedient to make provision for carrying the Hamilton and Lake Erie Railway through the village of Caledonia, with the consent of the council. And the railway company had applied to the Municipality for permission to carry the line of their railway along Merritt Street, and in order to cross the Grand River it would be necessary in making the approaches to the bridge over the same to make an embankment as shewn upon the plan thereunto annexed. And that the railway company had agreed, at their own cost, to open a street thirty feet wide as shewn upon the said plan, in lieu of that portion of Merritt Street occupied by the railway embankment. And it enacted that it should be lawful for the railway company to carry the railway through the village, and to pass over Park Street, and over and along Merritt Street, in the manner shewn upon the plan, and to make the approaches to the said bridge by trestle work and embankment in the manner shewn thereon. And that from and after the passing of the by-law those portions of said streets which were coloured on the plan as embankments, or as slopes of an embankment, should be forever stopped and closed up as a street or highway, and might be appropriated and used by the company to and for the purpose of such approaches. Provided always, that the by-law was passed subject to the condition that the railway company should furnish a new street or highway, thirty feet wide, along the said embankment, as shewn upon the plan.

This by-law was passed on the 4th of October, 1872.

The applicant made affidavit that his residence fronted on Front Street in the village of Caledonia, and the entrance to his stables had been hitherto from Merritt Street, and he owned property running the entire length of Merritt Street and stretching from Park Lane to Front Street, on the west

side of Merritt Street. He said the notices were not posted up or published.

W. T. Sawle, a printer in the office of the Grand River Sachem newspaper, published in the village of Caledonia, swore that it was the only newspaper published in the village, and there was no other printing office in the village but the printing office in which the said newspaper was published; that he had been in the said office for one year, and that no notice of the by-law was published in the said paper for the four weeks next preceding the passing of the by-law, nor at any time during the last twelve months. The affidavit was sworn in November, 1872.

In this Term affidavits were filed in answer.

John Scott, the Reeve of the Village, said, he had resided in it for twenty-six years, and had during a great part of that time been engaged in the public business of the Village as Reeve, and knew the roads and streets well, and especially the residence and premises of the applicant: that the applicant's usual means of access was and is from Front Street and by Winniett Street westward of his residence, and his ingress and egress to and from his residence and premises were not interfered with by the embankment on Merritt Street: that there was at the passing of the by-law, and still is a close board fence all along the side of his premises on Merritt Street, except at a point opposite to Queen Street where there is a gateway, and where the gateway is in fact a continuation of Queen Street, a part of which has been closed up and appropriated by the applicant, who has persistently refused to open the same, and now claims that his possession thereof for upwards of twenty years entitles him to hold it as his own property: that there is an opening of more than sixteen feet in width and more than twelve feet in height, left by the company under their railway along Queen Street, quite sufficient for all travel, and if the applicant wishes to enter his residence by Queen Street he can do so as formerly by travelling sixty-six feet further; that the places where the applicant has been in the habit

of entering his residence and premises from Front Street and Winniett Street are not in any way interfered with by the embankment complained of on Merritt Street: that Merritt Street, if wholly shut up, would but very slightly prejudice or interfere with any ratepayer of the village, or with the general public, being very little used or travelled on, and having heretofore remained almost entirely unimproved.

James Simington and *James Brown* each made an affidavit as to the usual places of entrance by the applicant to his premises, to the like effect as before stated.

Mr. *Austin*, an engineer, said, it was intended to carry the railway over Queen Street by trestle work, so as not to interfere with the access by the applicant to his property on Merritt Street: that the applicant was in possession of property on the other side of Front Street used by him as a mill yard, and the principal reason for obtaining permission to carry the railway along Merritt Street was to obtain foundations for the piers of the bridge over the Grand River at that point, in a way not to interfere with the flume on the plan, which would not have been practicable had the same been placed further to the east and below the lock. And that Merritt Street was in places a very broken piece of land and had never been graded as a street, and was but little used.

Burton, Q. C., shewed cause. The Council had power to grant the leave to the railway company to run through the streets of the village. The persons injured will be entitled to compensation from the company, and the applicant should be left to that remedy: Mun. Act, 1866, sec. 325. The cases of *Regina v. The Grand Trunk R. W. Co.*, 15 U. C. R. 121, and *In re Day and The Town Council of Guelph*, 15 U. C. R. 126, meet all the objections raised on this motion.

Furlong, supported the rule. The want of the proper notices, which is not denied, is fatal to the by-law, for the Council cannot close a highway without pursuing the re-

quirements of the Statute, nor where as in this case any one is deprived of access to his premises: *Winter v. Keown et al.*, 22 U. C. R. 341. This is not the case of using part of a highway, but of closing up a highway; for the whole width of Merritt Street for nearly its whole length between Queen Street and Front Street is stopped up by the by-law, and is, or will be, by the embankment of the company. He referred also to *Shelford on Railways*, 4th ed., vol. ii., 573; *Regina v. London and Birmingham R. W. Co.*, 1 Railw. Cas. 317; *Regina v. Train et. al.*, 6 L. T. N. S. 380; S. C., 2 B. & S. 640; *The Attorney General v. The Mid-Kent and South Eastern R. W. Co.*, L. R. 3 Ch. App. 100; *Regina v. Wycombe R. W. Co.*, L. R. 2 Q. B. 310.

WILSON, J., delivered the judgment of the Court.

I do not think it necessary to consider whether the Municipal Council could or could not pass the by-law in question, and give the right to the Railway Company to construct their road upon the public streets in the village, without notice of any kind of their intention to do so, and to the exclusion of the public, by appropriating the whole width of the road to that purpose; because, if they could, there would be no remedy for it, and if they could not, we should not, under the circumstances of this case, interfere.

I do not see anything in the Railway Acts which, in my opinion, authorizes a Municipal Council to close up the public highways and to grant them to railway companies. I see powers by which they are permitted to pass along highways, provided their rails do not rise above nor sink below the level of the road more than one inch; but that is because the highway is still to be kept for and used by the public, subject to the railway user of a portion of it, and that may be done without notice; but that is very different from turning the public off the highway altogether, and giving it to the railway company.

If a council can do it in one case, they can do it in all cases; and in that way King Street in this city might be

closed as a street and be granted by the City Council absolutely to a railway company, without notice of any kind to any one, and without compensation, if any amount could be a compensation in such a case.

I confess I should hesitate very long before I could adopt the decisions on this point, which do sanction such an assumption of power.

I pass that by for the present, reserving to myself full liberty to act on my own judgment when a case of this kind arises which calls for an opinion.

It is enough to say here, the Court is not obliged to set aside the by-law; *Grierson v. The Provisional Municipal Council of the County of Ontario*, 9 U. C. R. 623.

And we think we should not do so here, because the road in question, was scarcely formed as a road; it was not graded—hardly fitted for use. No one but the applicant has or seems to have any cause of complaint about it. His loss or inconvenience is not very serious. He used it only on occasions, preferring to use other streets instead; and these other streets are as or about as convenient to him as the street in question was, or would be. We think, also, we should not interfere, because the embankments have been already made in the streets, and the expense would be very great in undoing the work which has been performed; and the public convenience has been provided for by the opening of another road as near as can be to the former one, in lieu of the one that has been closed; and because the council could probably do all that has been done over again, by giving the required notices and passing another by-law; and because, also, the council has acted upon the decisions of this Court, which in this case may be allowed to have some effect.

For these reasons, we decline to interfere with the by-law. Properly, the Railway Company should have been a party to the rule.

Rule discharged, without costs.

PINKERTON QUI TAM V. ROSS.

33 Vic. ch. 20—*Partnership, registration of—Printing and publishing a newspaper—“ Trading purposes.”*

Held, that the business of printing and publishing a newspaper constitutes the partners employed in it a partnership “for trading purposes,” within the meaning of 33 Vic. ch. 20, sec. 1, O., and liable to the penalty for not registering such partnership.

The defendant, owner and publisher of a newspaper, entered into an arrangement with C. by which C. was to purchase half the interest in the paper and plant for \$850, to receive \$500 a-year for his labor, out of the business, and half the remainder of the net profits. Afterwards one F. came into the concern, paying a certain sum, and he and C., being practical printers, were each to have \$500 a-year for their labour out of the business, after paying expenses, and to own each one-third of the plant; and the balance of the net profits, if any, was to be divided equally among the three. Nothing was said about losses in either case.

Held, that a partnership existed in each case.

DECLARATION. First count: that after the passing of the Act of the Legislature of Ontario, 33 Vic. ch. 20, the defendant associated himself in partnership with one Joseph Craig for trading purposes, at the Town of Walkerton, in the County of Bruce, and carried on business there, and it became his duty within six months after the formation of the said partnership to deliver and file with the registrar of the county a declaration in writing, signed by defendant and his co-partner in the said partnership, containing the names, surnames, additions, and residences of each and every such partner or partners of said co-partnership, and the name style and firm under which the defendant and his co-partners carried on, or intended to carry on such business, and the time during which the partnership had existed or was to exist, and declaring that the persons named in the said declaration were the only members of such co-partnership; yet the defendant, though a resident of the said town of Walkerton, where the business of said co-partnership was carried on, not regarding his duty in that behalf, did not deliver or cause to be delivered to or filed with the registrar of the said County of Bruce any such declaration as aforesaid, under and according to the provisions of the said

act; but unlawfully neglected so to do, contrary to the said statute, whereby defendant hath forfeited \$200 to the plaintiff, who sues for the same as aforesaid in this action under the statute.

Second count: that after the passage of the Registration of Co-partnership Act of 1869, defendant associated himself in partnership with one Joseph Craig for trading purposes at the town of Walkerton, in the County of Bruce, and carried on business there and continued such partnership thereafter for a long space of time, to wit, seven months, or thereabouts, and then changed and altered the membership of said partnership by taking into membership of said partnership, as a member thereof, one James Fleuty, who thereafter, and after his admission into said partnership, became a co-partner with defendant and Joseph Craig for trading purposes as aforesaid, at the said town of Walkerton, and thereafter carried on business there; and it became and was the duty of the defendant within six months after said change and alteration in the membership of said partnership took place, to deliver or cause to be delivered to and filed with the registrar of the said County of Bruce a declaration in writing, signed by the said defendant and his said co-partners, containing the names, surnames, additions and residences of each and every partner of such co-partnership so altered and changed as to its membership as aforesaid, and the name, style or firm under which defendant and his said co-partners carried on or intended to carry on such business, and the time during which the said partnership so changed and altered had existed, or was to exist, and declaring that the persons named in the said declaration were the only members of said partnership so altered and changed as to its membership as aforesaid. Then the breach was alleged as to the changed partnership by not delivering to the registrar in the same way as in previous count, alleging the forfeiture of \$200, as in the previous count. The declaration closed with the allegation that plaintiff sued as well for our Sovereign Lady the Queen as himself, and claimed \$400.

Pleas,—Not guilty, by Statute 21 James I. ch. 4, sec. 4; 33 Vic. ch. 20, O.; 35 Vic. ch. 18, O. Issue.

The cause was tried at the Spring Assizes at Walkerton, before Wilson, J., without a jury.

It appeared on the trial that the defendant in May, 1871, was the owner and publisher of the newspaper called the *Telescope*, published in the village of Walkerton, and the plant, press, and types connected with the printing and publishing of that paper. In that month Joseph Craig agreed to purchase one half interest in the paper and plant for \$850. Craig was to carry on the business and receive \$500 a-year for his labor, and after the expenses were paid he was to have an equal share with the defendant of the profits.

When he commenced he gave defendant a note made by his brother, for \$725, and paid him in cash \$200; the note being for the balance of \$650 for the half interest in the establishment, and \$75 for paper and ink, which the defendant handed over to him when he took possession. The defendant was to edit the paper. That arrangement continued from May, 1871, to the 11th of March, 1872. If there were no profits sufficient to pay Craig the \$500, he was to go without that sum; he was to run the risk. They did not discuss the question of how the losses should be paid if losses occurred. He was to receive all moneys that came into the office, and to pay the running expenses out of it, and supposed he was to be liable for losses. If he bought \$50 of stationery, that, in the first place, would be charged to himself, and he paid that charge out of the moneys of the concern. Defendant said he did not wish his name to appear in the business or connected with the paper. In conversation he said nothing was said about losses one way or another. Craig purchased during the arrangement, on his own responsibility, all the paper and ink required for the office.

It was a job office as well as a newspaper office.

In May, 1872, James Fleuty came into the concern on a new arrangement. Defendant gave up to Craig his note and

took another for \$400. Fleuty was to give \$600; he paid \$300 in cash, and gave defendant two notes of \$150 each to secure the balance. The whole establishment was valued at \$1800. Craig, with the \$200 he had paid in cash, and the new note for \$400, was considered as having paid his \$600. Fleuty's share was arranged for as mentioned, and defendant's share was \$600.

Under the new arrangement Craig and Fleuty were each to have \$500 a-year, after paying expenses, and the surplus, if any, was to be divided equally amongst the three. Nothing was said about losses. If no surplus remained after paying expenses, Craig and Fleuty would not get the \$500 each. The books were kept in the name of Craig and Fleuty, and accounts rendered in the same way. Defendant's name was not to appear in the business.

The business went on till the 22nd August, 1872, when Fleuty got his money back that he had paid in. He did not get his share of \$500, for there was no surplus. Ross took back the establishment just as they went into it. He was to keep the debts due to the paper, and to pay those against it. Fleuty and Craig worked on the paper after that at wages.

The work was to be carried on by Craig and Fleuty entirely at their own expense. After paying expenses they were each to get \$500 a-year, and after that the three were to share in the profits. Fleuty thought the newspaper was carried on for political purposes, and for the Narrow Gauge Railway purposes. Craig and Fleuty were to assume all the responsibilities connected with the publication.

M. C. Cameron, Q. C., for defendant, objected at the trial that the case was not brought within 33 Vic. ch. 20, sec. 1, O. : that there was no partnership : that it must be the intention of the parties to form a partnership, or that such would not exist ; the mere fact that they might be liable as partners to third persons was not sufficient : that if these were partnerships, they both ceased before the action was brought, and no action would lie for penalties under the

Statute unless brought during the continuation of the partnership: that this was not a trading partnership, the business was mere work and labor, and not a buying and selling.

Robinson, Q. C., contra, contended that publishing a newspaper is a trading: *Doria & Macrae's Bankruptcy*, vol. i, p. 102; *Gimingham v. Laing*, 2 Rose 472: that the intention of the Statute would be defeated if the action could only be brought for the penalty during the continuance of the partnership; and that the intention to form a partnership could be of no consequence, for if a partnership be formed, there must be a registration, whatever the parties might intend.

The learned Judge doubted whether publishing a paper was buying and selling, so as to constitute the proprietors traders within the meaning of the Statute, and being a penal action he found a verdict for defendant. On the other points he decided in favor of the plaintiff. He found the penalty on each count at \$200.

The whole case was left open for the plaintiff, and the Court might determine on each count according to the evidence and facts.

In this term *C. Robinson*, Q. C., obtained a rule *nisi* to enter a verdict for the plaintiff pursuant to the Law Reform Act, for \$400, or for such sum and on such counts as the Court should think proper, on the grounds that the evidence sustained the cause of action stated in the declaration, and shewed a partnership for trading purposes, and entitled the plaintiff to recover.

M. C. Cameron, Q. C., shewed cause. The declaration, based on the first section of 33 Vic. ch. 20, O., charges defendant in both counts with having been associated in partnership for trading purposes. Publishing a newspaper is not a trading purpose; there is no buying or selling, but buying paper and making it into a newspaper. An innkeeper is not a trader, nor is a brickmaker who makes bricks from clay found on his own land which he

sells for profit. Most of the cases are collected in *Harman v. Clarkson*, 22 C. P. 291, and in *Edgar's Insolvent Act*, at pp. 34 and 35. What was done did not constitute a partnership. It was evident that defendant did not intend to become a partner, or to form a partnership.

Robinson, Q. C., contra. The learned Judge was of opinion there was a partnership, and so decided. When Craig and defendant entered into the arrangement, Craig paid for half the establishment, and as he was a practical printer he was to get \$500 out of the business for his services, and the balance of the profits was to be divided between them. Here there was community of interest not only in profits, but also in the machinery and plant necessary to produce the article from which the profit was expected, and the same principle prevailed when the partner was introduced into the new partnership formed under the last arrangement. That the only part of the work to be done by the defendant was to edit the paper, can make no difference. The defendant, as the editor and proprietor of a newspaper, was a trader. *Re Cooper*, cited in *Doria & Macrae on Bankruptcy*, vol. i., p. 102. See also the same vol. p. 105; *Holroyd et al. v. Gwynne*, 2 Taunt 176; *Port v. Turton et al.*, 2 Wils. 169; *Popham's Insolvent Acts* 19; *Re Whittle*, 18 L. T. 10; *Arch. Bankruptcy*, 12th ed., vol. i., pp. 87, 89; *Deacon on Bankruptcy*, 3rd ed., vol. i., p. 33.

RICHARDS, C. J., delivered the judgment of the Court.

In *Watts v. Parker*, 1 T. R. 34, if the brick maker rents the yard, or buys the clay to make the bricks, he becomes a trader within the meaning of the Bankrupt Act.

Sutton v. Weeley, 7 East 442, decides that when the brick maker owns the soil he is not liable to be made a bankrupt; the object of the bankrupt laws being to enable the creditors of those who get other people's goods into their own hands, and make use of them, to put such persons into bankruptcy.

In *Re Cooper*, 1 *Doria & Macrae* 102, the printer and

publisher of a newspaper was held to be a trader within the Act. The Commissioner said: "He bought paper intending to sell it an increased value, and comes within the general principles of the Bankrupt Laws. The covering of the paper with print does not alter the question."

In *Gimmingham v. Laing*, 2 Rose 472, 2 Marshall 236, it was held the publisher of a newspaper buying the whole daily impression from the proprietors, re-selling it at a profit, and bearing the loss on those that remained unsold, was a trader.

In *Re Whittle*, 18 L. T. 10, the bankrupt was a Professor of Music, and to aid him in obtaining celebrity in his professional pursuits he published a treatise on the voice. The Commissioner said: "I do not think one single isolated case of a man publishing a book incidental to his profession as a teacher of music, constitutes a trading within the meaning of the bankrupt laws. *Cooper's* case is clearly distinguishable. His buying and selling was day by day, with the intention to continue it and make a livelihood by it."

The distinction between what constitutes a man a trader and makes him liable to be put into bankruptcy, as such, when carrying on a business, and what does not so make him a trader, is sometimes very slight. Thus two men may be carrying on the business of brick makers, selling in the same market, and making the same kind of bricks, yet if one owns the soil from which he makes the brick he is not a trader; but if he buys the clay and makes the bricks, then he buys and sells, and becomes a trader. The value of the clay purchased may, and probably is, a very small portion of the value of the bricks manufactured and sold; nevertheless in fact he does buy and sell.

So the publisher of a newspaper does buy paper, and after expending labor and other materials on it he does sell that blank or raw paper as a finished newspaper, just as the brick maker, who buys the clay, after expending labor and other materials on it sells the same raw clay as a finished brick, and probably the relative change in the value of the two commodities may be somewhat alike.

The question has arisen frequently, whether an article ordered to be made is in the nature of work and labour, or is the purchase of a chattel within the Statute of Frauds. Many of the cases are referred to in *Lee v. Griffin*, 1 B. & S. 272 and these nice distinctions are often taken (a).

In some of the cases it was said the value of the skill and labor bestowed in producing the article, as compared with the value of the materials supplied, was the test whether the person making it could sue for work and labour or for goods sold. In giving judgment in *Lee v. Griffin*, 1 B. & S., Blackburn, J., said, at p. 277: "I do not think that the test to apply to these cases is, whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel."

A printer and publisher of a newspaper in suing a person who had taken his newspaper would not sue for work and labor, but for goods sold and delivered.

From reason and analogy to the decided cases we think the business of printing and publishing a newspaper constitutes the parties engaged in it as co-partners an association in a partnership for trading purposes, within the meaning of 33 Vic. ch. 20, O.

We concur with the learned Judge who tried the cause in the opinion that the arrangement made between the parties constituted them partners, and that the defendant was a partner in each of the partnerships referred to in the first and second counts of the declaration. The plaintiff's rule to enter a verdict for the plaintiff for \$400 should be made absolute; viz., \$200 on each count in the declaration.

Rule absolute.

(a) See, also, *Wolfenden v. Wilson* 33 U. C. R. 442.

GILLEN ET UX V. HAYNES.

Description of land—Falsa demonstratio—Rejection of evidence.

Plaintiff claimed under a deed from one C. of "all that parcel of land being composed of lot number 26, as laid down upon a plan of lots laid out by G. T. & W. T., being on the west side of George Street in the town of Belleville, described as follows," adding a description by metes and bounds which left a small strip at the south end of the lot uncovered.

Held, that the whole lot passed, and that the description curtailing its size should be rejected as *falsa demonstratio*.

Held, also, that evidence of what took place between the parties when C. afterwards conveyed the small strip to defendant, and as to defendant's possession thereunder, and the acquiescence therein of the person through whom plaintiffs claimed &c., was properly rejected.

EJECTMENT for part of lot number twenty-six, as laid down upon a plan of lots laid out by George Taylor and William Johnston Taylor, on the west side of George Street, in the Town of Belleville.

The defendant appeared and defended for a part of the land, that is to say, all that part of the said lot excluded from and not embraced and included in the description of metes and bounds following, that is to say, commencing at the north east corner of lot number twenty-six, then running in a straight line westerly along the northern boundary line of said lot twenty-six one hundred and thirty-two feet; thence running southerly seventy-eight feet along the western boundary line of said lot, and thence running easterly in a straight line parallel with the northern boundary line of said lot into George Street, and thence running northerly along the westerly side of George Street in a straight line to the place of beginning; and which said part of lot twenty-six, excluded from and not included in the above description, is about four feet six inches off the south side from front to rear of said lot twenty-six, which is the piece or parcel of land for which the defendant defends.

The cause was tried by Richards, C. J., at the last Spring Assizes at Belleville, without a jury.

The plaintiffs and defendant both claimed under Jacob Cronk. Cronk conveyed lot number twenty-six to William

Powell on the 13th of April, 1865, by deed registered on the 15th of July, 1865.

The deed from Cronk to Powell conveys "all that parcel of land being composed of lot number twenty-six as laid down upon a plan of lots laid out by George Taylor and William Johnston Taylor, being on the west side of George Street in the Town of Belleville."

The deed then proceeds, "described as follows," giving the metes and bounds as specified in the plan and defence of the defendant.

Powell conveyed the same land to the female plaintiff on the 9th of August, 1866, by deed registered on the same day. Cronk conveyed to defendant by deed dated the 7th of August, 1865, and registered 13th of September, 1865, lot twenty-five and all that part of lot twenty-six not heretofore sold and conveyed by him to William Powell.

The verdict was entered for the plaintiffs, with leave to the defendant to move to enter a non-suit or verdict for defendant.

In Easter Term *Harrison*, Q. C., obtained a rule calling on the plaintiffs to shew cause accordingly, or to shew cause why the verdict should not be set aside, for rejection of evidence of what took place between the parties when the deed was made by Jacob Cronk to the defendant, and of the defendant's possession thereunder, and of the acquiescence in such possession by William Powell, under whom the plaintiffs claim, and the plaintiffs' knowledge of the same; or why the verdict should not be set aside, because it is contrary to law and evidence and the weight of evidence.

Bell, Q. C., (of Belleville) shewed cause. The plaintiffs claim that the whole of lot twenty-six was conveyed by Cronk to Powell, and that there was no part of it left unconveyed to Powell when the deed was made to the defendant, and so no part of lot twenty-six was conveyed to defendant.

The deed from Cronk to Powell conveys lot twenty-six ;

and all that follows in the deed not consistent with that is *falsa demonstratio*, and must be rejected.

The defect in the description by metes and bounds is, that the second course, that is, from the north west angle of the lot southerly along the west limit of the lot is specified to be seventy-eight feet, without the words "more or less," or without saying to the south west angle of the lot; while lot twenty-six extends four and a half feet further south, or eighty-two and a half in place of seventy-eight feet; and that is the piece of land in dispute. Powell's deed to the female plaintiff describes the land in like manner as Cronk described it to Powell. The plaintiffs are entitled to retain their verdict. He cited *Jamieson v. McCollum*, 18 U. C. R. 445.

Harrison, Q. C., supported the rule. It is altogether a question of intention : *Doe dem. Miller v. Dixon*, 4 O. S. 101. The particular description by metes and bounds was not required if the general description were sufficient by itself. The conduct of parties in such a case is admissible as explanatory of the deed and description of the premises, and therefore the rejection of the evidence that only 78 feet were sold to Powell and not the whole lot, and that Cronk did not intend to sell the whole lot to Powell, is a ground of objection ; and if such evidence be admitted the verdict should beyond all doubt be then entered for defendant : *Forbes v. Watt*, L. R. 2 Sc. App. 214 ; *Doe dem. Piquotte v. Piquotte*, 4 U. C. R. 101 ; *Doe Lowry v. Grant*, 7 U. C. R. 125 ; *Burgess v. Denison*, 16 U. C. R. 457 ; *Clark et al., v. Bonnycastle*, 3 O. S. 528 ; *Arner v. McKenney*, 8 C. P. 373.

The particular description is the one which governs, and not the general description : *Doe dem. Murray v. Smith*, 5 U. C. R. 225 ; *Doe dem. Notman v. McDonald*, 5 U. C. R. 321 ; *Doe dem. Gildersleeve v. Kennedy*, 5 U. C. R. 402, 432 ; *Carman v. Molson*, 5 C. P. 124 ; *Doe dem. Smith et al. v. Galloway*, 5 B. & Ad. 43, 51 ; *Henderson v. Harris*, 10 C. P. 374 ; *Doe dem. Keating v. Wyant*, 6 O. S. 314 ; *Cartwright v. Detlor*, 19 U. C. R. 210 ; *Ferrie v. Wright, et al.*, 20 U. C. R. 644 ; *Martin v. Crow*, 22 U. C. R. 485 ;

Dohn v. Tice et al., 11 C. P. 289; *Lyle v. Richards et al.*, L. R. 1 H. L. 222; *Fox v. Clarke*, L. R. 7 Q. B. 748.

WILSON, J., delivered the judgment of the Court.

I have looked at every case cited, and not one of them is against the conclusion we have come to. Many of them cited by the defendant's counsel are in favour of the plaintiffs.

The rule is laid down by Parke, J., in *Doe dem. Smith et al. v. Galloway*, 5 B. & Ad., at p. 51, in these words:—
“Now the rule is clearly settled, that when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if premises be described in general terms, and a particular description be added, the latter controls the former.”

Here there is a sufficient description set forth by giving the particular name of the close, namely, “all that parcel of land being composed of lot number twenty-six, on the west side of George Street, in Belleville, &c.”

We may therefore reject the false demonstration curtailing the width of the lot by the four and-a-half feet in dispute.

That was the very point and subject in litigation in *Jamieson v. McCollum*, 18 U. C. R. 445, as decided by the Court of Appeal, and we follow of course that authority.

The evidence complained of as rejected, was rightly excluded.

The rule will be discharged.

Rule discharged.

HAMILTON ET AL. V. MOORE.

Contract—Liquidated damages—Work performed after contract time.

Plaintiffs on the 31st May, 1871, contracted to make and complete the iron work upon a building put up for defendant by 1st July, 1871, and to pay \$50 per week as liquidated damages for every week the same should remain unfinished after that time. Defendant had not the building ready to receive the iron work for nineteen weeks after the 1st of July, but the plaintiffs did not finish their work for more than seven weeks after they were enabled to begin.

Held, that such a special provision as that for liquidated damages would not be considered as incorporated in the new contract under which the work was done after 1st July, though the plaintiffs might be liable for the delay in an action for damages.

THIS cause, already reported *ante* pp. 100, 275, was again tried, and a verdict was found for the plaintiffs for the sum of \$1200, the balance of their claim, being the amount which the plaintiffs had failed to recover on the previous trial.

The evidence shewed that the different parts of the building which the defendant was putting up were contracted to be done by different and independent workmen, the iron part of it being that which the plaintiffs had engaged to do. It also appeared that the brick and mason work, to and upon which the plaintiffs' work had to be placed, was not ready to receive their work for a period of nineteen weeks after the first day of July, 1871, the day by which the plaintiff's were bound to have their work completed, and that the plaintiffs did not finish their work for the further period of five weeks after the expiration of the nineteen weeks.

And the defendant claimed, that if the plaintiffs were exempted from any forfeiture during the nineteen weeks, they were liable to it at any rate for the five weeks in question.

Leave was reserved to move upon this point.

In this term *Ferguson* obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside, on the ground that the defendant, upon the evidence

given at the trial, was and is entitled to retain and pay to himself the sum of \$50 per week as liquidated damages, out of the contract price for the period during which the work was delayed, and the verdict has been given for the whole demand of the plaintiffs, including the sum of \$250.

M. C. Cameron, Q. C., shewed cause. As the plaintiffs by their contract were bound to do their work between the 31st of May, 1871, the date of the contract, and the 1st of July following, and as they did not get possession of the work from the defendant for nineteen weeks after the 1st day of July, they were thus thrown by the defendant's act and conduct, or that of his workmen, for which he was answerable, into a different and more disadvantageous season of the year to do the work. And the weekly penalty, which they were willing to run the risk of if they had the time of year to do the work in which they had contracted for, cannot be held to attach to them for any alleged default in the work, if it had to be done at a different or more difficult season for such work. *Holme et al. v. Guppy et al.* 3 M. & W. 387, is exactly in point.

Ferguson supported the rule. The plaintiffs might not have been bound to do the work after the 1st of July; but having agreed to do it, and doing it after that day, the whole of the terms of the original contract must be presumed to have been carried forward, and to have been embodied in the extended agreement, and so the defendant was as much entitled to the weekly deduction for the delay, which the architect attributed to the plaintiffs after the expiry of the nineteen weeks, as if the plaintiffs had got possession of the works at the original specified time. The case lately decided in this Court of *McDonell v. Canada Southern R. W. Co.*, 33 U. C. R. 313, lays down that rule.

WILSON, J., delivered the judgment of the Court.

By the original contract the plaintiffs had from the 31st of May till the 1st of July to do their work, that is, a full calendar month. They were not enabled, by reason of the

defendant's default, or that of his workmen, to begin and finish their work at and within the time provided.

They began their work about the 1st of September and finished it about the 24th October, being about twenty-four days beyond the calendar month which was originally allowed to them.

The plaintiffs were therefore guilty of some delay in fact, and for which they may be answerable in an action for damages, but the question is, whether that delay will enable the defendant in this action to deduct the \$50 a week, as and for liquidated damages. We think it does not.

That penalty, as it may properly be called, was to cover a specific period, and it does not follow that it must be carried as a stipulation into the new contract, so as to be applied to any and every portion of the year.

The whole work may be done under the new arrangement as provided for by the original agreement, and the defendant may be fully indemnified for all loss he may sustain by reason of the plaintiffs' delay or misconduct in the prosecution of the work, although the weekly deduction of \$50 should be held to be no portion of the new contract, and we do not feel at liberty to incorporate so special a provision into the new agreement, which the parties had adopted originally under different circumstances.

I may say here that when the case was last before us, I thought the plaintiff should reply specially to the plea which claimed the deduction, and such a replication was added. Perhaps it was not necessary to have done so: *Holme et al. v. Guppy et al.*, 3 M. & W. 387; *Russell v. Sa Da Bandeira*, 13 C. B. N. S. 149.

The rule will be discharged.

Rule discharged.

REGINA V. FIRMIN.

Tavern and Shop Licenses Act of 1868, sec. 25-26—Conviction under—Right of appeal.

F., a shopkeeper licensed to sell intoxicating liquors in quantities not less than a quart, was convicted before the Police Magistrate under 32 Vic. ch. 32 O., for selling half a pint of whiskey contrary to the provisions of the Act, and "without the license therefor by law required." His appeal to the General Sessions of the Peace, was dismissed on the ground that by sec. 25 the conviction was final and without appeal.

Held, that sec. 25 only applied to persons who sold without any license; that F. came under sec. 26; and that by sec. 36, he had a right of appeal.

MOTION for a *certiorari*. The charge against the defendant was, that he, being a licensed shopkeeper, did on the 5th day of July, 1872, in his shop and premises (describing the situation), unlawfully and knowingly sell to one James Millan, spirituous liquors in quantities less than a quart, to wit, half a pint of whiskey, contrary to the provisions of "The Tavern and Shop License Act of 1868," and without the license therefor by law required.

On this charge he was convicted before the Police Magistrate of the City of Toronto, and fined \$50 and costs, it being his first offence against the provisions of the Act; in default of payment, forthwith to be levied by distress and sale of his goods and chattels, and in default of sufficient distress, thirty days imprisonment in the common gaol with hard labour.

The defendant appealed from this conviction to the General Sessions of the Peace, and the Court made an order dismissing the appeal, on the ground that, by the 25th section of the statute under which the conviction was made, the conviction before the Police Magistrate was final and conclusive, and the section provided, that against such conviction there should be no appeal to the Court of General Sessions of the Peace.

In Hilary Term last, *E. E. W. Hurd*, obtained a rule calling on the Chairman of the Court of General Sessions of the Peace for the County of York, the prosecutor and the convicting Justice, to shew cause in Easter Term, why

a writ of *certiorari* should not issue to remove into this Court the order dated 13th December, 1872, made by the Chairman, dismissing the appeal, and all papers and proceedings in said appeal when said order was made; on the ground that Firmin being declared in the conviction to be a licensed shopkeeper, and to have sold liquor in less quantities than a quart, was not liable to be treated as having sold without license, and thus deprived of the right of appeal, but under the true construction of "The Tavern and Shop License Act of 1868," was entitled to appeal; and such order of dismissal should not have been made, but the appeal should have been allowed and heard.

During this Term, *N. Murphy* shewed cause. The license which the defendant had was to sell not less than a quart, and the offence was that he sold half a pint. He, therefore, sold half a pint of whiskey without license. His license was to sell a quart or more. He had no license to sell half a pint. The 22nd section of "The Tavern and Shop License Act of 1868," 32 Vic. ch. 32, O., embraces all who sell by retail without the license therefor by law required.

Sec. 1, enacts "No person shall sell *by retail* any spirituous, fermented, or other manufactured liquors within the Province of Ontario, without having first obtained a license authorizing him so to do, as hereinafter provided." The Act provides for the obtaining of licenses for retailing of spirituous and other liquors to be drunk in the tavern, &c., in which the same is sold; and also licenses for the retail of such liquors in quantities not less than one quart, in shops and places other than taverns, &c.

Sec. 22, enacts that "Any person who shall sell or barter spirituous, fermented or manufactured liquors of any kind, or intoxicating liquors of any kind, *without the license therefor by law required*, shall, for the first offence, on conviction thereof, forfeit and pay a penalty of not less than \$20, besides costs, and not more than \$50 besides costs; and for the second offence, on conviction thereof, such person shall be imprisoned in the County gaol of the County

in which the offence was committed, to be kept at hard labour for a period not exceeding three calendar months." For the third offence, hard labour in the common gaol for six months.

Sec. 23, forbids the sale of intoxicating liquors on certain days or times, except for medicinal purposes.

Sec. 24, provides the penalties for violating the provisions of section 23: For the first offence, not less than \$20 fine with costs, or 15 days imprisonment with hard labour, against certain persons who may contravene the section; for the second offence, a penalty of not less than \$40 with costs, and not less than twenty days imprisonment with hard labour: for the third offence, not less than \$100 with costs, or fifty days imprisonment with hard labour; and for a fourth or after offence, a penalty against all such of not less than three months imprisonment with hard labour in the common gaol.

Sec. 25, enacts "All prosecutions *under this Act* for the offences of vending, selling, or disposing of wine, whiskey, gin, rum, brandy, beer, ale, cider, or any spirituous, fermented, or manufactured liquors without license, whether the prosecution be for the recovery of a penalty or for punishment by imprisonment, shall take place before any two or more of Her Majesty's Justices of the Peace, having jurisdiction in the municipality in which the offence is committed, or in cities and towns where there is a police magistrate, before the police magistrate, who, it is hereby declared, shall have authority to hear and determine the same in a summary manner according to the practice and procedure," * * * of Consol. Stat. U. C. ch. 103, and the acts amending the same: * * * "And the conviction or order of the said two or more Justices, or of the said Police magistrate, as the case may be, shall be final and conclusive; and against such conviction or order, there shall be no appeal to the Court of General Sessions of the Peace, or to any other court; * * * and all prosecutions under this section shall be commenced within twenty days after the commission of the offence, or after the cause of action arose, and not afterwards."

Sec. 26, directs that all prosecutions under this Act, other than those mentioned in the next preceding section and section thirty-five, (which applies to the prosecution of the keepers of disorderly inns), may be brought and heard before any one or more of Her Majesty's Justices of the Peace in and for the county where the forfeiture took place; * * and in cities and towns where there is a police magistrate, before the police magistrate; and the procedure shall be that of Justices out of Sessions in relation to summary convictions and orders; and all prosecutions provided for under this section, shall be commenced within two months after the commission of the offence or the cause of action arose and not afterwards."

Sec. 36, in the proviso, declares "That any conviction under this Act except convictions under sections 25 and 35, may be appealed from to the Court of General Sessions of the Peace, under the provisions of chapter 114 of the Consol. Stat. of U. C.; but every such appeal shall be tried by the chairman of the said court without a jury."

There does not seem to be any prosecution under the Act for imposing penalties or punishment by imprisonment on parties for selling without license *simpliciter*. The only section by which these penalties are imposed, is section 22, for selling "without the license therefor by law required." No doubt, whoever sells by retail without a license, sells without the license required by law for that purpose, and can be tried under section 25. And persons who sell half a pint when they have only a license to sell a quart, sell that half a pint without a license. The conviction is to take place before two magistrates or a police magistrate; and the prosecution must be commenced within twenty days. The punishment would be precisely the same, and the only benefit that would result from creating two classes of cases to come under the 22nd section, would be, that he who violated the law and had a shop license, would have an appeal to the General Sessions, but he might be tried by a single Justice of the Peace as well as a Police magistrate; the prosecution could be com-

menced within two months after he committed the offence, and the appeal would be tried by the chairman of the court without a jury.

E. E. W. Hurd, contra. The right of appeal ought not to be taken away, and if the statute can be so construed as to give it, that view ought to be preferred to the other. "Selling without a license," and "selling without the license therefor by law required," certainly may mean different things. This defendant did not sell without a license; he is accused of selling half a pint without the license therefor by law required. He can be tried for that offence under the 26th section of the Act, and that gives him an appeal. One who has sold a half a pint or quart without a license, has incurred the penalty under the 22nd section, and comes literally within section 25, and can be tried under it for selling without a license. In this way the plain literal meaning can be given to the statute, and no violence done in construing it.

RICHARDS, C. J., delivered the judgment of the Court.

If it had been intended that under section 25, all persons who sold without the license therefor by law required should be prosecuted under the 25th section, it would have been very easy to have used the very words contained in the 22nd section.

It does seem absurd that when the penalties are imposed that can and must, under this Act, apply to selling by retail in both forms, either by the quart or in lesser quantities, are precisely the same, and imposed in the same section and by the same words, that as to one class of offenders the trial should be under one section, allowing in one case one Justice to preside instead of two, allowing an appeal where the other does not, and extending the time for commencing the prosecution beyond what the other does. Yet in the very next section, the 23rd, if persons who are licensed violate certain provisions, though liable to severe penalties and imprisonment not so severe as in the 22nd section, yet under that section the prosecu-

tion must be under the 26th section, in which there is an appeal. Under the 35th section, the keepers of disorderly inns can be tried before the Mayor, Police Magistrate, and a Justice of the Peace or two Justices of the Peace, and his license annulled; and he shall not be capable of obtaining a license for two years; yet against a conviction under that section there is no appeal.

The statute can be worked out by allowing a prosecution under the 25th section where the party accused has sold at retail without any license at all; and by prosecuting under the 26th section where he has a license to sell not less than a quart, but is without the license therefor, that is, to sell the smaller quantity. In this way, full force can be given to the literal wording of all the sections of the statute; and a person situated as this defendant is can have an appeal, and the case will be tried by the Chairman of the Court without a jury.

This defendant, perhaps, thinks the appeal will be beneficial to him in this case, as he appears to have been fined the maximum penalty under the statute for the first offence.

On the whole, when the statute can be construed so as to give the right of appeal, and such interpretation of it is more consistent with its literal meaning, we think we ought to give that effect to it.

We think the rule for a *certiorari* should be made absolute in this case.

Rule absolute.

SMITH V. COMMERCIAL UNION INSURANCE COMPANY.

Ne recipiatur—Relief from—Delay—Insolvency—Causes of action passing to assignee—Rescinding Judge's order.

On the 6th February, 1873, a rule *nisi* was granted to set aside a verdict for defendants, and on the same day defendants obtained a summons to stay proceedings, until security was given for costs, on the ground that the plaintiff had become insolvent, which summons was made absolute on the 10th, with leave to the plaintiff, nevertheless, to take out and serve his rule *nisi*. Through misapprehension the rule was not issued, and a *ne recipiatur* was entered on the 14th February. The declaration contained three counts. 1. On a fire policy. 2. In trover, alleging as special damage that plaintiff's business was stopped, and he lost customers. 3. In trespass to goods, alleging similar special damage. No objection was made in chambers that the causes of action in the second and third counts did not pass to the assignee. On application to the Court in Easter Term

Held, that the plaintiff might be relieved from the *ne recipiatur* on payment of costs, notwithstanding the delay.

Held, also, that the causes of action under the first and second counts passed to the assignee, for as to the second, as the conversion, the primary cause of action, passed to the assignee, the special damage dependent upon it could not be sued for by the debtor; but that the cause of action in the third count did not pass, being for a personal claim of the debtor independent of his right of property.

Held, therefore, that as to the third count the order should not have been made: that being made without authority it might be rescinded as to that count, notwithstanding the delay in moving against it; and that the action might be stayed on one count, leaving it to proceed on the others.

THE declaration in this cause contained three counts:—The first on the policy of insurance granted by the defendants for loss against fire.

The second in trover, whereby the business of the plaintiff was stopped, and he was prevented for a long time from carrying on the same, and lost many customers, who would, if his business had not been so stopped, have continued customers of his.

The third in trespass to goods, alleging the same special damage.

The pleadings are set out in the report of the demurrer, *ante* p. 69.

The case was tried before Morrison, J., at the Winter Assizes at Toronto, in 1873, when the defendant had a verdict.

The facts were that on the 6th of February, 1873, the plaintiff moved for and obtained a rule *nisi* to set aside the verdict rendered in this cause.

On the same 6th of February the defendants obtained a summons in Chambers to stay all proceedings in this cause until the plaintiff should give security for costs, in consequence of his insolvency, and the transfer of his estate to an assignee in insolvency.

The summons was argued on the 10th of February, and an order was made upon it directing a stay of proceedings in the cause until the plaintiff should give security for costs in the sum of \$400, or until the official assignee should intervene and have his name inserted as plaintiff herein in place of that of the plaintiff, with liberty, nevertheless, to the plaintiff to take out and serve the rule *nisi* for which he moved as aforesaid.

The rule was not issued because of some misapprehension as to the person who it was supposed would attend to it, and on the 14th of February a *ne recipiatur* as to the rule was entered with the Clerk of this Court by the defendants.

The plaintiff did not make any objection on the argument of the summons that the causes of action in the second and third counts were personal to the plaintiff, and did not pass to the assignee.

M. C. Cameron, Q. C., during this term, obtained a rule calling on the defendants to shew cause why the order of Robert G. Dalton, Esquire, Clerk of the Crown and Pleas of this Court, made in Chambers, should not be rescinded, on the ground that some of the causes of action in this cause do not pass to the assignee in insolvency of the plaintiff; or why William P. Mason, the said assignee, should not be allowed to intervene and become a party to the record in place of the plaintiff; and why the rule granted in last Hilary Term, to shew cause why the verdict herein should not be set aside and a new trial be had, should not be heard and argued, notwithstanding the

ne recipiatur entered herein during last Hilary Term; or why such *ne recipiatur* should not be set aside.

Hector Cameron, Q. C., shewed cause. The plaintiff did not, in Chambers, take the objection he now takes to the order, that the causes of action in the second and third counts did not pass to the assignee. The order was made and served on the 10th of February last, and the term did not end until the 15th of that month. The plaintiff should, therefore, if he complained of the order, have moved against it in the last term. It is now too late to do so: *Bank of Montreal v. Harrison*, 19 C. P. 276.

The causes of action referred to did pass to the assignee, but even if they did not, they are joined with a cause of action which plainly has passed to the assignee, and the action should therefore be stayed in whole, or as to that part of it which has passed: *Denton v. Williams*, 8 Dowl. 123; *Mason v. Polhill*, 2 Dowl. 61; *Goatley v. Emmott*, 15 C. B. 291; *Morgan v. Steble et al.*, L. R. 7 Q. B. 611; *Hodgson v. Sidney*, L. R. 1 Ex. 313; *Beckham v. Drake et al.*, 8 M. & W. 846, S. C. 11 M. & W. 315; 13 Jur. 921; 2 H. L. Cas. 579; *Rogers v. Spence*, 13 M. & W. 571; S. C. 12 Cl. & Fin. 700; *Brewer v. Dew et al.*, 11 M. & W. 625. The plaintiff may go on as a trustee for the assignee as to the claim on the policy, if the assignee assent to it; but the assignee has put in a written consent to be made a plaintiff in lieu of the present plaintiff.

The *ne recipiatur* was properly entered, so that if the plaintiff be allowed to argue the rule for a new trial, it should be upon payment of costs, and so also he should pay costs if the order moved against be varied, because he is now moving on a point taken here for the first time, and which, if taken in Chambers, would have made the present application unnecessary.

M. C. Cameron, Q. C., supported his rule. The rule *nisi* for a new trial was not issued or served by mistake, and the want of a proper understanding who it was should take it out, and there was some mistake, too in supposing

that the order in Chambers stayed all proceedings in the cause, without any exception. The plaintiff should, therefore, be relieved upon terms. As to the causes of action and rights which pass to the assignee, they are the "debts, assets, and effects," under sec. 10 of the Insolvent Act of 1869. Torts are not provable against the debtor; so neither do torts nor the remedies for them pass from the debtor: *Arch. Bank.* Vol. ii., 12th Ed., 936, 937; *White v. Elliott et al.*, 30 U. C. R. 253. The assignee, of course, can intervene under the Insolvent Act of 1869, secs. 42, 43. The plaintiff is entitled to prosecute this action, because of the claims in it which do not belong to the assignee.

WILSON, J., delivered the judgment of the Court.

We think the plaintiff may be relieved from the *ne recipiatur* of the defendants against the rule to shew cause why a new trial should not be granted, but, of course, on the payment of costs.

Then as to the order made in Chambers, it is quite right if all the causes of action contained in the declaration passed to the assignee. If they have not passed, then such order must be made as will meet the requirements of the case, if the plaintiff is not barred by delay in moving against the order.

It must be considered at the same time that the plaintiff's counsel made no objection to the order being made on the ground that the causes of action did not all pass to the assignee. He submitted to the order being made in that form, and he did not move against it in the term in which it was made, although he had five days of that term left within which to move, and although he knew, as well then as now, of his rights in respect of the different causes of action.

The order would properly be made without authority as to the causes of action in the second and third counts, if they have not passed to the assignee, and in that view relief may be given against so much of the order as applies to these counts, notwithstanding the delay, if the

plaintiff has established his right to prosecute, for his own benefit, these causes of action.

As to the count in trover, that is a cause of action which does pass to the assignee.

In *Beckham v. Drake*, 2 H. L. Cas. 579; 13 Jur. 921; in the House of Lords, Parke, B., said (13 Jur. at p. 924,) "Some actions for torts do pass. Actions for injuries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignee, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this."

Here the count is for converting to the defendants' use and wrongfully depriving the plaintiff of the use and possession of his goods, whereby special damage resulted to him: the stoppage of his business and the loss of customers.

The plaintiff could recover under this count the full value of the goods, or any damage done to them, less than their value, and also the special damage: *Davis v. Oswell et al.*, 7 C. & P. 804.

The value of, or damage to, the goods would pass to the assignee under the words of our Statute, "All his personal estate, property, debts, assets, and effects," according to the cases before cited, but the special damage would not.

Then what is to be done in such a case?

In *Brewer v. Dew et al.*, 11 M. & W. 625, trespass for taking goods under an unfounded claim for debt, *per quod* the plaintiff was injured in his business, and was believed by his customers to be insolvent, and certain lodgers left his house, was held not to pass to the assignees on his bankruptcy. It was held the plaintiff was entitled to recover in respect of the special damage.

In *Rogers v. Spence*, 13 M. & W. 571, Lord Denman, C. J., in the Ex. Ch., considered that actions of trespass *quare clausum fregit*, and to goods might be maintained by the bankrupt "in respect of the immediate and present violation of the possession of the bank-

rupt, independently of his rights of property," and added, at p. 581, "And substantial damages may be recovered in respect of such rights, though no loss or diminution in value of property may have occurred; and even where such an incident has accompanied or followed a wrong of this description, the primary personal injury to the bankrupt being the principal and essential cause of action, still remains in him, and does not vest in the assignee, either as his property or his debts."

In *Beckham v. Drake*, 13 Jur. 921, Parke, B., at p. 925, seems to think that both the debtor and the assignee should sue in such a case.

In *Brewer v. Dew et al.*, 11 M. & W. 625, it is intimated that the debtor would not lose his own special claim and ground of damage.

In *Hodgson v. Sidney*, L. R. 1 Ex. 313, which was an action for a false representation of the defendant, by which the plaintiff was induced to make certain money advances to a third person, "whereby the plaintiff had sustained great loss, and became and was adjudicated bankrupt, and suffered great personal annoyance and was put to great trouble and inconvenience, and was greatly injured in character and credit," the defendant, except as to the claim in respect of the plaintiff's becoming and being adjudicated bankrupt, &c., pleaded that the plaintiff's loss was a pecuniary loss which passed to his assignee on bankruptcy. To which the plaintiff demurred.

Martin, B., asked, "Can you split a cause of action in this manner?"

Bramwell, B., in giving judgment, said, at p. 315: "Assuming that there was special damage recoverable, I do not think that the cause of action can remain partly in the bankrupt to recover such damage, and partly can pass to the assignee to recover the pecuniary and ordinary damage. If two several torts had been committed there would be no reason why the bankrupt should not recover in respect of one, and the assignees in respect of the other. But where, as in this case, there is but one single cause of action resulting in direct

pecuniary and in special damage, the bankrupt cannot say that enough of it remains in him to enable him to recover the special damage."

Judgment was given because the plea might be taken as if pleaded to the whole declaration, and because "the pecuniary damage claimed and alone capable of being recovered passed to the assignee."

Morgan v. Steble, L. R. 7 Q. B. 611, followed the decision in the preceding case, and was founded on a cause of action of the like character as the preceding one. On the same point see also *Wetherell v. Julius et al.*, 10 C. B. 267.

I think it unreasonable that the cause of special damage should be lost to the debtor because the primary cause of action has gone over to the assignee, who cannot sue for the special damage. The debtor might sue as a trustee for the assignee, and so recover in that way the whole amount. If he did he would have to account to the assignee for the share of the recovery which passed to the creditors, and he would retain his own share of it.

If there are in reality two distinct claims, why should they not both be preserved, either by the assignee and the debtor suing together, or by splitting the cause of action if it be necessary to do so?

I do not come to any positive conclusion on this point. The authorities indicate that as the claim on the trover count for the conversion, the primary cause of action, passes to the assignee, the special damage alleged cannot be sued for by the debtor, as it is dependent upon and parcel of the principal cause of action.

As to that count, the order having been made for security for costs, the order, we think, should stand.

As to the trespass count, the authorities shew that the plaintiff has a right to sue for the trespass as a personal claim of his own, because it was his actual possession which was invaded, for which he is entitled to sue, independently of his right of property, as it is "an extension of the protection given to his person, and the primary personal injury to the bankrupt is the principal and essential

cause of action." Per Cresswell, J., in *Beckham v. Drake*, 13 Jur. 927. See also per Wilde, C. J., p. 923.

And as the plaintiff has the right to sue for it, he can proceed, of course, for the special damage consequent upon it.

The order, so far as it relates to that count, should not have been made.

The order should remain as to the first and second counts, and be modified by striking out a stay of proceedings as to the third count.

It was said that one part of the action could not be stayed while the other was not stayed. There is no difficulty in that, more than in striking out one cause of action and leaving the other to stand.

In *Wetherell v. Julius, et al.*, 10 C. B. 267, judgment on demurrer was given for the plaintiff on the one count, because the action in it did not pass to the assignee, while on the other count judgment was given against him, because it did pass to the assignee.

That is all we can do at present.

The rule will be absolute setting aside the *ne recipiatur*, and permitting the plaintiff to proceed upon his rule *nisi*; and it will be absolute so far as relieving the plaintiff from giving security for costs as to the cause of action contained in the third count, upon payment by the plaintiff of the costs on the proceedings of and affected by the this application.

Rule absolute accordingly.

REGINA V. HOWARTH.

[AND TWO OTHER CASES.]

Conviction for sale on Sunday—Evidence—Sale of peppermint lozenges by druggist "Selling drugs and medicines"—Severe penalty.

Defendant, a druggist in the City of Toronto, sold five cents worth of peppermint lozenges at his shop on a Sunday. The purchaser did not ask for them as medicine, he had no doctor's certificate, and he was asked no questions. It was shewn that peppermint lozenges were generally kept and sold by druggists as medicine. Defendant having been convicted on this evidence under the "Act to prevent the Profanation of the Lord's Day," C. S. U. C. ch. 104, and fined \$20 and costs, the conviction was removed by *certiorari*.

Held, 1. That the finding of the magistrate as to whether the lozenges were or were not medicine was subject to review by this Court.

2. That there was no evidence to sustain the conviction;—for the article, sold as it was by a druggist, must be considered *prima facie* a medicine, though it was not expressly asked for or sold as such, and the case was within the exception in the Act, "selling drugs and medicines," *Wilson, J.*, doubting. The conviction, therefore, was quashed.

The Court will not quash a conviction upon the weight or upon a conflict of evidence, but there must be reasonable evidence to support it, such as would be sufficient to go to the jury upon a trial.

The extreme severity of the fine, under the circumstances of the case, remarked upon.

ON the 24th of January, 1872, a writ of *certiorari* was issued from this Court, directed to Alexander Macnabb Esquire, Police Magistrate of the City of Toronto, commanding the said Police Magistrate to return forthwith to this Court the information, evidence, depositions, conviction, and all proceedings touching or concerning a certain conviction made by the Police Magistrate on the 18th December, 1871, against defendant, on the information of one George Albert Mason.

From the Police Magistrate's return to this Court it appeared that the information stated that defendant "doing business on Yonge Street, in the City of Toronto, did on Sunday, the 19th day of November, A.D. 1871, follow his ordinary calling by having his shop door open and selling goods therein, contrary to law."

The matter came before the Police Court on the 25th of of November, when *Paul Christie*, Detective, was sworn. He said, "I know defendant's place of business. It is on the east side of Yonge Street, in the City of Toronto. I

was in there on the 19th November, 1871. The store was open, and shutters off the door, and the store lighted up. I bought some peppermint lozenges. I bought five cents' worth. I did not buy for medicine. I had no doctor's certificate. I went in and asked for five cents worth of peppermint lozenges, and a man gave them to me without asking any questions. Defendant keeps a drug store. It was about six o'clock in the evening." Cross-examined—"I asked for 'peppermints' or 'lozenges.' I did not state what I wanted them for."

Neil C. Love, druggist, sworn, said: "I know defendant. He is a druggist, on Yonge Street. All druggists deal in medicinal lozenges. Peppermint lozenges are ordinarily kept by druggists for sale, and are medicinal lozenges.

The investigation was then adjourned, and on being resumed further evidence was given that peppermint lozenges kept by druggists were medicinal lozenges. Evidence was also given to discredit Christie.

The defendant's attorney took several objections before the Police Magistrate, which will be found in the rule *nisi* below, and on the 18th of December the Police Magistrate fined defendant \$20 and costs.

The conviction stated the offence to be, "For that on the 19th day of November, 1871, the same being the Lord's day, commonly called Sunday, in the City of Toronto aforesaid, the said J. L. Howarth, being then and there a dealer in an article of confectionery, called and known as peppermint lozenges, did unlawfully do certain worldly business of his ordinary calling of a dealer in peppermint lozenges aforesaid upon the said Lord's day, by then and there selling to one Paul Christie divers peppermint lozenges of the value of five cents, which sum was then and there paid him for the same by the said Paul Christie, the said peppermint lozenges not being drugs or medicines, and the said business not being the conveying travellers or Her Majesty's mail by land or by water, or a work of necessity or charity, contrary to the form of the Statute," &c.

Notice of intention to apply to this Court was duly given to the Police Magistrate, and in Hilary Term, 1872, upon filing the writ of *certiorari* and return thereto.

E. E. W. Hurd obtained a rule *nisi* calling on George Albert Mason, the informant, and Alexander Macnabb, Police Magistrate for the City of Toronto, to shew cause why the conviction in this cause should not be quashed, on the following grounds :—

1. That the information discloses no offence under the Act, Consol. Stat. U. C. entitled “An Act to prevent the profanation of the Lord’s day in Upper Canada,” or any other Act in force in the Province of Ontario, and does not specify any Act which had been violated ; and does not set forth any business or calling as being that of the accused, and does not negative the exceptions in said Act, and said information charges no offence except inferentially, and is uncertain and double. 2. That the evidence on which said conviction is based does not establish any offence to support the conviction, but, on the contrary, negatives the offence in the conviction. 3. That the conviction is not of any offence charged in the information, and is wrong, among other things, in that it does not negative that the said James L. Howarth was a seller of drugs and medicines (a class excepted from the operation of said Act), or that the selling of the articles was a work of necessity or charity, and does not state what Act or Statute has been violated in respect of which violation the conviction was made.

This rule was argued before Morrison, J., and Wilson, J., in the sittings of the Court after Hilary Term last, who, differing in opinion, ordered the matter to be reargued.

During this term, *Harrison*, Q. C., shewed cause. As to the objection of the variance between the information and conviction, no conviction is to be quashed for want of form : Consol. Stat. U. C. ch. 104, secs. 10, 11. If the conviction is otherwise valid the information will make no difference. The Act does not require the information to be in writing. As to want of form see also *Rex v. Ridgway*,

5 B. & A. 527; *Regina v. Millard*, Dearsly's C. C. 166; *Regina v. Munro*, 24 U. C. R. 44; *Regina v. Shaw*, 10 Cox C. C. 66. As to the second objection, the druggist is not excepted from the Act, unless he sells the drugs as a work of necessity. The object of the Act was not to exempt a class, but to exempt them from the consequences of acts which are works of necessity. It was for the magistrate to determine on the evidence whether the lozenges were medicines. There must be something in the transaction to shew that they were sold as medicine to exempt the seller. As to wrong conclusions of justices of the peace, see *Rex v. Davis*, 6 T. R. 177; *Rex v. Smith*, 8 T. R. 588; *Rex v. Reason*, 6 T. R. 375, *Rex v. Glossop*, 4 B. & Al. 616; *Cave v. Mountain*, 1 M. & G. 257; *Brittain v. Kinnaird et al.*, 1 Bro. & Bing. 432; *Regina v. Rea et al.*, L. R. 1 C. C. 21; *Ex parte Vaughan*, L. R. 2 Q. B. 114. The objection to the conviction, that it does not negative all the exceptions to the Act, is untenable. The conviction follows the Act, except that it omits the title of the Act, and that is not essential, as the Act is a public one. It is followed, as the statute requires, in effect; *Paley on Convictions*, 5th Ed., 167, 175, 176; *Regina v. Cleworth*, 9 L. T. N. S. 682; *Regina v. Osler*, 32 U. C. R. 324; *Griffith v. Harries et al.*, 2 M. & W. 335; *Rex v. Jukes et al.*, 8 T. R. 536, 540. As to the form: *Paley on Convictions*, 5th Ed., 683. The Court will not intend against the conviction: *Regina v. Hazell*, 13 East 139.

Hurd supported the rule. It is true the Statute does not require the information to be in writing, but it is the basis of the jurisdiction: *Hespeler v. Shaw*, 16 U. C. R. 104; and is defective, in that it does not state the defendant's occupation or calling. If keeping the shop door open was equivalent to exposing for sale, the information is double. The conviction is not explicit enough, under the third objection, as to the articles sold. It should negative the exceptions in the Statute. On the whole there is not enough shewn to have conferred jurisdiction. The evidence is not sufficient to support the charge. It

does not state what the purchaser wanted the lozenges for. The intendment is in favor of the purchaser. It will not be assumed that he intends to break the law. It is submitted that the words of the exception in the Statute, "Selling drugs and medicines," except druggists as a class. [RICHARDS, C. J.—Do not the words of the exception imply *primâ facie* that selling drugs is a work of charity ?] Yes. The fact that selling drugs is a business excepts the business, that is, the druggists as a class. The onus is on the prosecutor to shew that the druggists are not excepted. It is different from liquor cases. Here the keeping open the drug stores is in the interests of society, and the intendment must be in favor of the druggists. There is no evidence to support the statement in the conviction that defendant is a dealer in confectionery.

RICHARDS, C. J.—I do not understand that my learned brothers differ as to the formal objections in relation to the difference between the complaint and the conviction.

The convicting justice, after trying the defendant for an offence different from that laid in the complaint, alleges in the conviction that he did "certain worldly business of his ordinary calling of a dealer in peppermint lozenges aforesaid, upon the said Lord's day."

The evidence certainly shews that his ordinary calling was not that of a dealer in peppermint lozenges, but a druggist.

The averment "the said peppermint lozenges not being drugs or medicines," is important, and the defendant ought not to be convicted unless there was some evidence from which the Police Magistrate might infer that peppermint lozenges were not medicine.

The witness Christie says : [Here the learned Judge read the evidence of Christie as above set out.]

The other evidence on the point shews that all druggists deal in medicinal lozenges. Peppermint lozenges are ordinarily kept by druggists for sale, and are a medicinal lozenge.

In *Ex parte Vaughan*, L. R. 2 Q. B. 114, 118, Shee, J., said: "If there was no evidence at all upon which the justices could adjudicate then they would be acting improperly, but here they have arrived at a decision on the evidence before them, and we cannot interfere."

Rex v. Smith, 8 T. R. 588, shews that the magistrate is the sole judge of the weight of the evidence given before him, and the Court will not examine whether or not he has drawn the right conclusion from the evidence; but if no evidence appear on the conviction to support a material part of the information, the Court will quash the conviction. In that case defendant was charged with selling to one Robert Chappell 30 loaves of bread which had not been baked 24 hours. The evidence given in support of the conviction was as follows: "*Mary Chappell*, upon her oath, deposeth, &c., that she keeps a shop in Drury Lane, and sells bread: that she buys it of J. Smith, of St. Martin's Lane, the corner of Hemmings Row, baker: that this day (1st March, 1800) she was at home and received thirty loaves of bread: that they were brought to her by the said J. Smith's cart, and that the said John Smith's servant delivered them into her shop: that the man put them in himself; that the bread was felt by her about twelve o'clock, that it was new; that she has the shop and parlor which go in the name of Robert Chappell; and he has no partner: that the said bread could not have been baked twenty-four hours. John Dunn, upon his oath, deposeth and saith, that he knows a shop in Drury Lane, kept by Robert Chappell, which is near Wych Street: that he passed the shop this morning and saw a cart standing there with a great number of loaves; that he is sure that they were thirty which he saw carried from the cart into the shop; that it is a chandler's shop; that the loaves smoked and were hot; that he is sure they were new loaves; that the baker lives in St. Martin's Lane, &c. Thomas Moore, upon his oath deposeth and saith, that he knows a baker at the corner of some street in St. Martin's Lane: that this morning, at his shop, the corner of Craven Buildings, he saw some

bread delivered at Chappell's, which he saw reeking and smoking, and that it was apparently hot ; that he cannot tell whose cart it was ; that a hand bill was left at his shop some time before, that a Mr. Smith had opened a shop at Mr. Chappell's to sell cheap bread ; that he thinks there were twenty-five or thirty loaves of bread. John Langland, upon his oath, deposeth and saith, that he sees a cart every day with the name of Smith on it ; that this day he was told that that cart was there at eight o'clock ; that he usually sees it at eleven o'clock." It is then added, "It appears on the conviction that the defendant being called upon for his defence before the magistrate said 'that he had never seen the Act ; that he had heard people who came into his shop say that bread must not be sold till twenty-four hours after baking ; that this morning he sent thirty new loaves to Mr. Chappell's house, and he told the boy to tell Mr. Chappell not to sell them until Monday ;' but did not produce any evidence to prove the same, nor did he require any further time for that purpose." The conviction was quashed.

In *Rex v. Chandler*, 14 East 267, a conviction was had before Justices of Middlesex against a defendant for keeping a still. The still was found in the yard of defendant's house. It had been recently worked off. The house was proved to be in Middlesex, but the Court held there was no evidence to shew the garden was in Middlesex also, and the conviction was held bad in that respect.

In *Rex v. Davis*, 6 T. R. 178, Lord Kenyon says, "It is sufficient in convictions, if there were such evidence before the magistrate as in an action would be sufficient to be left to a jury. Here we cannot say that there was no evidence of the fact for the consideration of the magistrate."

The case of *Regina v. Smith*, 8 T. R. 588, above cited, would seem stronger as to evidence to sustain the conviction than the one now before us.

In *Rex v. Glossop*, 4 B. & Al. 616, where defendant was convicted of having caused a play to be performed, and the evidence showed that defendant was present at rehearsals

and offered to engage performers, upon the objection being taken that it did not sufficiently appear that defendant caused the play to be performed, Abbott, C. J., said, at p. 618, "The objection cannot prevail, unless the evidence stated on the face of the conviction be such that no reasonable person could draw the conclusion that defendant caused this particular play to be performed."

Cave v. Mountain, 1 M. & G. 257, and *Mills v. Collett*, 6 Bing. 85, shew that in an action of trespass the sufficiency of the evidence to sustain a conviction cannot be gone into, or, in other words, the magistrate would not be liable if he made a mistake.

Brittain v. Kinnaird et al., 1 Bro. & Bing. 432, is the Bumboat case. That merely decides that a conviction, in an action of trespass against the magistrate who has jurisdiction over the subject matter, is conclusive evidence of the facts stated in it; to which should be added, until reversed or quashed. In that case Park, J., thought the small vessel seized might be held to be a "boat," and referred to *Johnson's Dictionary* and *Falconer's Marine Dictionary*.

In *Regina v. Stimpson*, 4 B. & S. 301, Wightman, J., said, at p. 307: "The claim of the prosecutor was *prima facie* against common right, and it was necessary he should produce evidence in support of such a claim. The defendant set up a claim in derogation of the prosecutor's exclusive right, and gave evidence of the user by himself and others, of a right of fishing, for forty years by the latter, which being in a tidal navigable river is *prima facie* a public right. The Justices decided that there was no *bond fide* claim of title by the defendant; but I think it is impossible to say there was none. On the contrary, the prosecutor's right was disputed as far as it was possible to do so. If the Justices were warranted in going on merely because they believe that the defendant was conscious that he was doing wrong, I do not see what claim might not be overruled by them."

Crompton, J., said, at p. 309, "I think there was no

reasonable evidence on which the Justices could say that there was not a *bonâ fide* claim or dispute."

Blackburn, J., said, at p. 310, "The question for us is, whether there was reasonable evidence on which the Justices could find that a claim of title was not *bonâ fide* set up by the defendant."

In *Paley v. Birch*, 16 L. T. N. S. 410, the complainant made out a *primâ facie* case of right to a fishery, and the right set up by defendant was only sustained by shewing a fishing therein a few times, which might have been furtively, and the Court thought there was evidence to justify the magistrates in holding that defendant had not shewn a *bonâ fide* claim of right to fish there.

In *Regina v. Justices of Llanfillo, Brecknockshire*, 15 L. T. N. S. 277, Shee, J., said, at p. 278, "Though it should appear upon a more full examination of the evidence before the magistrates that their conclusion was not wholly satisfactory, yet if there is evidence before them on which they might arrive at the conclusion to which they came, that this Court ought not and would not interfere with their decision. If there was no evidence at all on which their adjudication was properly to proceed, they would be acting improperly, and disregarding in fact altogether the provisions of this section of the Act of Parliament."

Our statute clearly contemplates that the selling of 'drugs and medicines' may take place on Sunday. I should say this permission or exception ought to be exercised reasonably, though when made an exception to a penal statute it seems difficult to hold a party liable who literally brings himself within the words of the statute.

In *Brittain v. Kinnaird et al.*, 1 Bro. & Bing. 432, they referred to the dictionaries as authorities. On referring to *Brande & Cox's Dictionary of Science, Literature, and Art*, I find "Lozenge:" "In pharmacy, a medicinal substance made up into a small cake to be gradually dissolved in the mouth. Sugar, gum, and starch are the usual inert parts of the lozenges; and minute quantities of active substances are added, according to the purposes for which they are

intended ; such as ipecacuanha or squills, for pectoral lozenges ; extract of poppies or opium for sedativ elozenges ; cayenne pepper as a stimulant ; oil of peppermint as an antispasmodic, &c."

I think then *primâ facie* the buying on Sunday of peppermint lozenges, when sold by a man carrying on the business of a druggist and dealer in medicines, in a shop not usually kept open the whole of the day on Sunday, but only for a limited time, is the purchase of a "medicine," within the meaning of the exception to the Act.

I do not think the mere fact that the purchaser did not ask for it as a medicine, or the seller enquire of the purchaser if he wished it as a medicine, any evidence to rebut the *primâ facie* nature of the sale as a medicine.

If he had asked for castor oil, most people would suppose he wanted it for a medicine, but I believe in combination with perfumed oils it is not used as a medicine, but for dressing the hair. Nevertheless, if the purchaser complained that the druggist who sold it to him had violated the law because he did not ask him if he wanted it as a medicine, or had not a doctor's prescription for it, and he himself did not want it as a medicine, I should say that would not be any evidence to shew it was not medicine.

Several of the cases to which I have referred have been those in which by the decisions the magistrates gave themselves jurisdiction to try the case. In these cases it may be urged the Courts will require more evidence than in those cases where the right to try the offence is clear, but the magistrates are only to consider the evidence to shew the guilt of the party. I do not understand that they will uphold a conviction when there is no evidence ; and no evidence, I apprehend, means no reasonable evidence to justify the conclusion ; not a conflict or weight of evidence or a weighing of evidence.

In *Paley* on Convictions, 5th ed. 126, the rule is thus laid down : "As to the degree and sufficiency of the evidence, and the credit due to the witnesses, the magistrates alone are the judges. In this respect they are placed in the

situation of a jury ; and, therefore, whatever the Court of Queen's Bench, upon an inspection of the proceedings, would deem sufficient to be left to a jury on a trial, when the evidence was set out on the face of the conviction, was considered by them adequate to sustain the conclusion drawn by the convicting magistrates. Beyond that, the Court would not exercise a judgment upon the credit or weight due to the facts from which the conclusion was drawn."

In *Cornwell v. Sanders*, 3 B. & S. 206, relative to a matter which was before the Court on a case stated, where the Justices in the first instance had found against the defendant, when Wightman, J., thought on the evidence there was no evidence on which the Justices could convict, the rest of the Court thought they could not review the evidence and say on which side it preponderated. Blackburn, J., said, p. 216 : " But it is enough to say that there is evidence which, if I had been trying the question at *Nisi Prius*, I could not have withdrawn from the jury."

In *Brown* (respondent) *v. Turner, Melbourne, Chapman, and Peters* (appellants), 13 C. B. N. S. 485, on a charge against the four appellants for having gone on land in search or pursuit of game, the constable, at 6 A.M. Sunday morning, met the four appellants walking together in company on the high road. He searched Brown, found five dead wild rabbits recently killed, and an iron spud. When searching him the other three walked away. Melbourne was found the same day in bed, his clothes and shoes found very wet and dirty, more so than they would have been from walking on the high road. On the same day Chapman was found, and his clothes were searched ; a net suitable for taking rabbits, which appeared to have been recently used, was found in one of the pockets ; on taking the net out some rabbit's fur flew from it, as well as from the pocket of his coat, and the cuffs of his coat were smeared with fresh blood. It was proven that about 10 A.M. of the same day, Peters sold a wild dead rabbit. Held, no sufficient evidence to convict Melbourne, but sufficient as to the others.

In the case cited by my brother Wilson, *Regina v. Wood*, 5 E. & B. 49, where, if the magistrate had decided snow to be *filth*, the Court would not interfere, the Judges say, in relation to a crowded city, with its sewers and lanes and deposits of various kinds, snow might become filth, and when in that state it would be filth, and the evidence might shew that.

If these lozenges were peppermint lozenges, and there is nothing to shew they were not; they were bought as such, and the conviction is for selling such; I fail to see any evidence to shew they are not medicine.

I must confess that when I read the evidence in this case I was surprised at the conviction which followed it, and I was more surprised, when the magistrate had a discretion to fine from one dollar to forty that he should have fined the defendant twenty dollars for the sale of an article which most men engaged in the same business consider a medicine, and when the sale was made to a person whose sole object appears to have been, not to cause the law to be observed, but to break it himself in the act which he did, and to make money out of that violation of the law in carrying on the occupation of an informer.

If this defendant had been convicted before, or it was obvious that he was intending to and desirous of violating the law, the severe fine imposed might be thought reasonable; but when the party has been tricked into the sale, without any apparent intent of violating the law, I should have thought the lowest fine which the law permitted would have answered the ends of justice, even if the informer had not realised a very large sum by the share of the fine which was payable to him.

I think the convictions in all of the cases should be quashed, the other two cases being in effect the same as the one now under discussion.

MORRISON, J.—I concur in the judgment of the learned Chief Justice. I think the evidence disproves the charge. It shews that the defendant was a druggist, and that the article sold was used as a medicine.

If we apply the test put by Lord Kenyon in *Rex v. Davis*, 6 T. R. 178, it seems clear to me there would have been no case to go to a jury, and so no evidence to justify a conviction.

I am not disposed to strain the letter of the statute against parties not intentionally contravening it, to enable a person who invokes its provisions, not in the interests of society, or for the object of compelling a proper observance of the Lord's Day, but who, as in this case, for the purpose of putting money in his pocket, designedly induces a druggist, by a mere trick, to break the law, as this complainant supposed, by purchasing the article in question.

I must also say that, considering the circumstances of this case and the other two cases before us of a similar character, the penalties inflicted by the Police Magistrate, assuming the defendant infringed the law, were unnecessarily severe, and I am glad that we are able to relieve the defendants by quashing the convictions.

WILSON, J.—I quite agree in the principles expressed by the learned Chief Justice, that a conviction cannot be sustained without any evidence, and that the evidence required to support it is that which the Court can see does and may reasonably support it.

If there be evidence which may support it, if considered in one view, the conviction will be maintained, although the magistrate has formed an opinion very different from that which the Court would have formed, or although the Court may think the magistrate has come to a wrong conclusion: *Ex parte Vaughan*, L. R. 2 Q. B. 114; *Mould v. Williams et al.*, 5 Q. B. 469; *Regina v. Wood*, 5 E. & B. 49.

I had formed a different opinion from that expressed, as to the conclusion the magistrate had come to. It is not the opinion I should have formed, but I did not think his conclusion was wholly unwarranted. Pepper or whiskey might be medicines, and if the defendant had been charged with selling either of them, and a witness had said that

he simply asked for pepper or whiskey, and not for medicine, and other witnesses had said that pepper and whiskey were medicines, and were ordinarily kept and sold by druggists, and if the magistrate upon that evidence had convicted the defendant, I would not be able to say he was plainly in error. He might make use of his own knowledge and sense to some extent on a subject of that kind.

I rather dissent from, than assent to, the opinion expressed by the learned Chief Justice.

Rule absolute.

HOPE V. DAVIDSON.

Seduction—New trial—Excessive damages.

In an action for the seduction of plaintiff's daughter, the daughter proved her seduction under a promise of marriage, her removal from her father's house, and concealment for a long period from her father. Certain letters to defendant were put in, which she at first admitted to be hers, but upon some indelicate portions being read she at once denied that she wrote them. These letters contained an admission of criminal intercourse with defendant's brother, exonerated defendant from blame, and denied any promise of marriage. It appeared that some of the letters had been sent by the daughter under cover to defendant's brother in the States, and by him re-mailed to defendant, but the brother was not called, though in Court during part of the trial. Defendant in his evidence denied any promise of marriage, but admitted the seduction. The parties were all respectable, and belonged to the farming class. The jury having given \$1600 damages, defendant moved for a new trial on the ground of excessive damages, and on the ground that the finding of the jury that there was a promise of marriage, and that the letters were not genuine, was against law and evidence. No affidavit was filed, or new evidence suggested, and defendant declined to pay \$1000 into Court to abide the event of a new trial. Under these circumstances the Court refused to interfere.

ACTION for the seduction of the plaintiff's daughter, tried before Morrison, J., at the last Winter Assizes for the County of York.

On the trial certain letters were produced and shewn to the plaintiff's daughter, and she admitted having written them. Afterwards some passages of an indelicate nature

were read from these letters, and she promptly denied having ever written them. The letters also spoke of an improper intimacy between her and the defendant's brother, and stated expressly that defendant had not promised to marry her, and that she did not blame him.

She was requested to write several sentences, which she did; and the counsel for the plaintiff, in addressing the jury, pressed them not to believe that the letters were written by the plaintiff's daughter.

In her evidence the witness stated the defendant had promised to marry her. She also denied having any improper connection with defendant's brother. It also appeared that some of the letters referred to had been enclosed to defendant's brother, who resided in the United States, and had been enclosed by him to the defendant here. It also appeared that defendant's brother was in the Court house during a portion of the trial, and was not called as a witness.

There was a good deal of discussion about admitting evidence as to the defendant's circumstances, with a view to the question of damages. The defendant's counsel strongly objected to the evidence, and it was not given.

The defendant was examined. He admitted he was the father of the child of which plaintiff's daughter was delivered, but denied that he had ever promised to marry her. He stated that he was engaged at the time to be married to another woman, whom he had since married, and the plaintiff's daughter knew it; and that the letters referred to were written by plaintiff's daughter, and were received by him from her.

The jury gave a verdict for the plaintiff for \$1600.

In Hilary Term *Harrison*, Q. C., moved for a rule *nisi* for a new trial, on the grounds, that under the circumstances appearing at the trial the amount of damages was excessive, and was enhanced by proof of a promise of marriage, sworn to by the plaintiff's daughter, which was denied by defendant, and shewn not to be the fact by the

letters of the plaintiff's daughter, proved on the trial, and that the jury found said letters not genuine, their finding in that respect being against evidence and the weight of evidence.

The Court hesitated about granting the rule, suggesting that if the defendant would bring \$1000 into Court to abide the result of a new trial, they might then think of granting it. After delaying for some time, the defendant stated on affidavit that he was not in a position to pay the money into Court. The rule *nisi* was then granted.

During this term *K. McKenzie*, Q. C., shewed cause. The case proved at the trial shewed very gross conduct on the part of the defendant. At the time he was a Sunday School teacher, and a person who was apparently a respectable member of society: his father being a respectable man, in good circumstances. He induced the girl to leave home, and took her away, and stayed with her a night in this city at an hotel, passing as man and wife. For months her father did not know where she was. Defendant would not tell him, and he was under great care and anxiety with regard to his unfortunate daughter. The defendant has filed no affidavits to permit the plaintiff to file affidavits in reply, to shew how these letters, which the defendant produced at the trial, were got up. The defendant had induced the poor girl to give up all his letters, and when questioned about the letters produced, she at first thought they were genuine, but when the indelicate passages were read she promptly denied their having been written by her. Her manner and whole course of conduct satisfied the jury she was to be believed. Defendant ought to have filed an affidavit from his brother, who had been in Court, and was not called, as to these letters, and as to the statement contained in them about the alleged improper intimacy. That might have helped the defendant's case. He suggests no new evidence. The jury believed the girl's denial; and the production of the letters and further vilifying the girl, and suggesting an improper intimacy with his own brother, which must now be assumed to be false, well warranted

the verdict. Independently of the letters the conduct of the defendant,—a man filling the office of a Sunday School teacher,—aiding this girl to go away, so that her father could not find out where she was for months, and on that very journey occupying the same room with her in the hotel here, pretending to be man and wife, these facts would justify the jury in giving a large verdict. On this application the defendant does not shew that the verdict is large in proportion to his means of payment: *Wood v. Hurd*, 2 Bing. N. C. 166; *Smith v. Woodfine*, 1 C. B. N. S. 660; *Berry v. Da Costa*, L. R. 1 C. P. 331. *Smith v. Woodfine*, 1 C. B. N. S. 660, shews, that unless there is reason to suppose the jury acted under some undue influence the verdict ought not to be disturbed. *Appleton v. Lepper*, 20 C. P. 138, shews that a new trial will not be granted in a case like this, where the undisputed evidence in the case would have warranted the verdict.

Harrison, Q. C., contra. The witness at the trial first admitted that the letters were hers, and had been cross-examined as to matters contained in them which she admitted, shewing strong confirmatory evidence that they were written by her, and defendant's own evidence was express on the point. The weight of evidence was strongly in favor of the letters being genuine, and if so, they shewed that there was no promise of marriage, and a reference to facts and circumstances that should have induced the jury to give but moderate damages. The taking away of the girl was at her own request, her father being a stern man, and she said she thought he would kill her if she remained at home. It was defendant's wish to make her satisfied; and, as some atonement to her for his fault, that induced him to do what is now urged as an aggravation of the charge against him. The real facts of the case are, that two young people being thrown together forgot themselves, and the evil being done, the defendant wished as little disgrace as possible to attach to the girl or her family, and got her out of the way in the hope that something might occur, and the whole matter pass off with as little

injury as could be. At this time he was engaged to be married to another woman, and the plaintiff's daughter knew it, and that was the reason she so stated in her letters, and also that she did not blame him. The defendant's brother would not consent to be sworn on the trial, or make an affidavit for this application; in fact he is not friendly to him. The defendant is in very moderate circumstances; and cannot pay this verdict. The amount is large and altogether disproportionate to the injury. He cited as to new trials for excessive damages, *Sharpe v. Brice*, 2 W. Bl. 942; *Ash v. Ash*, Comb. 357; *Ducker v. Wood*, 1 T. R. 277; *Hewlett v. Cruchley*, 5 Taunt. 280; *Chambers v. Caulfield*, 6 East 244; *Price v. Severn*, 7 Bing. 316; *Armour v. Boswell et al.*, 6 O. S. 153; *Barclay v. Adair*, 7 C. P. 157; *Dodd v. Norris*, 3 Camp. 519; *Starkie on Ev.*, 4th ed., vol. i. 804; *Batchelor v. Buffalo and Brantford R. W. Co.*, 5 C. P. 127, 129.

RICHARDS, C. J., delivered the judgment of the Court.

The fact that in cases like this the jury may take into consideration the distress and anxiety of mind under which the father labored from the seduction of his daughter, makes it difficult to decide when damages are excessive.

It is said actions of this sort are brought for example's sake, and when a man occupying a position calculated to give him influence over those who are brought into contact with him conducts himself improperly, and seduces a man's daughter, and takes her away, and aids in sending her from the father, the sufferings of the father are naturally enhanced by such conduct, and for example's sake with such a man the damages might be large.

If, in addition to this, in his desire to escape from some portion of the damages which his own conduct was likely to bring on him, he brings forward letters calculated to aggravate the injury he has done the girl, and calculated to bring her down to a lower depth of degradation than she was in by his act of seducing her, and the jury being satisfied that in this respect he was putting forward as hers letters

which she did not write, should add to the damages in a way to make an example of him, I do not see how the Court can properly interfere to give a new trial on the materials before us.

The defendant does not file any affidavits to shew that these letters are genuine, nor file any affidavits verifying some of the facts stated there which were denied by the girl, so as to give something like additional affirmatory evidence of their genuineness. This would have let in affidavits in reply, but the plaintiff is cut out from that.

The learned Judge, who heard the girl give her evidence, and heard what the defendant himself and the other witnesses said on that subject, cannot say that he is dissatisfied with the finding of the jury as to the genuineness of the letters, if it be understood they have in effect found they are not genuine.

Then there is no affidavit filed on the application for a new trial as to the defendant's circumstances, to shew that he is not in a position to pay this verdict. He did file an affidavit that he could not pay the \$1000 into Court, and in that he refers to his circumstances as to property, but that not being on this application for a new trial cannot be referred to.

We are asked to grant a new trial merely to reduce the damages in a case where the defendant is not prepared to pay into Court any damages, though clearly admitting that the plaintiff is entitled to some damages; and if we give the defendant an opportunity of reducing the damages, and he fails, the plaintiff will be in no better position than he now is; and if the defendant succeeds in reducing the damages, the plaintiff has no assurance that he will be in a better position to recover his reduced damages than he is now with so large an amount.

We all would have been better satisfied if the damages in this case had not been so large, but it is not desirable that trials of this sort should be multiplied, or that our Courts should be tainted with them oftener than is necessary.

We are virtually asked to submit this case to the consideration of another jury, and for what purpose? To see if they will, on the same evidence as has been given on the trial, reduce the damages to a sum less than the verdict was rendered for.

Not that an innocent man has had a verdict found against him which affects his character, and deprives him of his property; but that a man who admits he has seduced the daughter of a respectable man, and the evidence shews it was accompanied by circumstances of peculiar aggravation, has had a verdict given against him for too large an amount.

He does not offer to pay into Court a sum of money equal an amount which it might be thought reasonable a jury should give against him, or any amount whatever. He offers no new evidence, and does not even shew by affidavit filed on making the motion that the payment of this verdict would be ruinous to himself, but suggests on the argument that it is so.

If the defendant had proposed paying a sum of money into Court, in accordance with the views suggested in *Batchelor v. Buffalo and Brantford R. W. Co.*, 5 C. P. 127, we might have felt justified in granting a new trial, though, as already intimated, in cases like these, Courts are unwilling to multiply trials if they can be avoided.

The language used by Sir John Hannen, in a case where a new trial was moved for in the Court of Probate, will in many respects apply to granting a new trial in this case; though in that case it would seem there were much stronger reasons for granting a new trial than there are in the case before us. The case was *Davis v. Brecknell*, in the Court, of Probate, and was a testamentary suit. I find the fullest report of it in the *Law Times (Journal)*, vol. 55, p. 48, dated 17th May, 1873 (a).

The suit was tried twice before Lord Penzance. On the first trial the jury could not agree. On the second trial a verdict was found for the plaintiff. An application was

(a) Now reported in L. R. 3 P. & D. 88.

made for a new trial, but the rule was discharged. Subsequently a material witness on behalf of the plaintiff was prosecuted and convicted of perjury. A rule *nisi* was obtained for a new trial. Sir J. Hannen said in refusing a new trial, "It is a striking thing, and rather shocks one, that a man who has been convicted of perjury upon the statement he has made with a view to establishing his rights, should remain in possession of the victory he has obtained by that which a jury has pronounced to be perjury."

In referring to the facts he said: "One set of witnesses told their story, and the man who has been convicted told his story. In the first instance, the jury could not agree. The case was tried a second time, before Lord Penzance, and the same witnesses were examined, and this man again told his story. The jury heard his story, and they believed him. The demeanor of the witness was taken into consideration both by the Judge and the jury, and the Judge was not dissatisfied with the verdict. Both Judge and jury had the opportunity of seeing the manner in which the several witnesses gave their evidence, and both believed that this man was entitled to credit. What has happened since? By means of the machinery of the criminal law the man who when he was heard was believed has been prosecuted. His mouth was closed, and then those persons who were not believed before had it all their own way, and they established a case against him. Without saying that the jury was wrong, it would not be right for me now—no new facts having been brought forward, and no new witnesses being called,—to grant a new trial. I must accept the finding of the jury—sanctioned as it was by Lord Penzance, who had the opportunity, which I have not had, of seeing the manner in which the witnesses gave their evidence. The rule must therefore be discharged with costs."

On the whole, we think the rule in this cause must be discharged.

Rule discharged.

HOLLIDAY V. ONTARIO FARMERS MUTUAL FIRE INSURANCE
COMPANY.*Libel—Justification—Evidence—Privileged communication.*

The plaintiff, who was at one time an agent of defendants, having left them, defendants published in a newspaper an advertisement headed "Caution," and containing the words, "N. B. Notwithstanding the false statements of (plaintiff) to the contrary he is no longer an agent of this Company." Defendants justified, pleading that after he ceased to be in defendants' employ, the plaintiff stated to M. & G. that he was still defendants agent, At the trial it appeared that the plaintiff after he had ceased to be defendants' agent, asked G., who had been insured in defendants' Company, to insure. G. believed he was still acting for defendants, but after signing the application discovered that it was to another Company, and the plaintiff then refused to allow him to withdraw. One M., who had previously insured with the plaintiff in defendants' Company, said the plaintiff called when the time to renew came, and being asked if he came to *renew* the policy, said 'Yes,' and expressed annoyance when he found she had already renewed it with defendants. The plaintiff denied these statements.

Held, that this evidence, if believed, was sufficient to prove the plea; and it having been withdrawn from the jury, a new trial was granted for misdirection.

Semble, that the communication was privileged; but this ground was not taken at the trial.

This case was carried to appeal, but the appeal was dismissed without any decision on the merits, there being a misunderstanding as to what took place at the trial.

THE declaration charged the defendants with the publication of a libel in the *Oshawa Vindicator* newspaper, of and concerning the plaintiff, in relation to his business as an insurance agent for obtaining risks against losses by fire, and the carrying on and conducting by him of the same, in the following words: "Caution—N.B. Notwithstanding the false statements of Daniel Holliday to the contrary, he is no longer an agent of this Company;" meaning thereby that the plaintiff, who before the publication of the said libel had been employed by the defendants as an agent of their Company, had, after he ceased to be so employed, falsely and for improper purposes stated that he was still an agent of the defendants' Company, whereby the plaintiff was injured in his credit and reputation as an insurance agent, and in his said business.

The second count was to the same effect, but stating the

innuendo to be, that the plaintiff, who had before been employed by the defendants, had been dismissed from their employment for improper conduct as their agent.

Pleas,—1. Not guilty. 2. As to so much in each of the said counts of the declaration as stated that the plaintiff is no longer an agent of the defendants; that before the time of the said publication the plaintiff had ceased to be an agent of the defendants, and at the time of the publication he was not an agent of the defendants. 3. As to the words, "Caution—N.B. Notwithstanding the false statements of Daniel Holliday to the contrary," the defendants say that the plaintiff did after he had left the service of the defendants, and while he was no longer employed by them, state to several persons, and amongst others to one Malcolm Gillespie, of the Township of Brock, Esquire, and one John Martin, of the Township of East Whitby, Yeoman, that he was still an agent of the defendants.

Issue.

The cause was tried before Galt, J., at Toronto, at the last Spring Assizes, when a verdict was rendered for the plaintiff for \$500 damages.

The following was the substance of the evidence, so far as it is material on this motion :

John S. Larke, the publisher of the *Oshawa Vindicator*, proved that he received a letter of the 25th November, 1872, from Levi Fairbanks, the secretary of the defendants' Company, desiring him to "insert the enclosed three times, and forward the bills to this office." The "enclosed" was a slip cut from another newspaper. It was headed, "Caution." Then followed an advertising notice of the defendants' Company, favourable to the Company, containing the names of the Directors, and at the foot of it was, "N. B.—Notwithstanding the false statements of Daniel Holliday," &c.—the alleged libel.

The slip enclosed had been searched for. It was lost, and could not be found. A copy of it was published in the paper which was produced.

Levi Fairbanks, the Secretary of the defendants' Com-

pany, among other things, said, "Mr. Bickell, the President of the Company, and myself, were named a committee by the Directors to draft an advertisement. It was not submitted to the Directors before publication."

In cross-examination he said: "The authority I had was in writing. All our resolutions are in writing. The advertisement was not submitted to the Directors."

On re-examination: "The resolution will appear on the minutes. The minutes are not here." Notice to produce was then put in and admitted.

The plaintiff in his examination said, among other things, "I was agent of defendants in July, 1868. I continued their agent till the beginning of August, 1871. I had taken about 1600 risks. I took an agency in the Isolated Risk Company in July, 1871, and sent my resignation to defendants in writing, at the end of July. My resignation was accepted. I published hand-bills announcing my resignation. I made no secret of it."

In cross-examination: "I know Mr. and Mrs. Martin. I applied to Mrs. Martin since I became agent of the Isolated Risk. I endeavoured to effect an insurance. I did not tell her that I wished to renew the risk which Mr. Martin had with the defendants. I wanted to get the risk for the Isolated Company. I think I said I called about their insurance. She said they had renewed it already. She named the agent. I did not say: 'That is too bad; they are ahead of me.' I called on John Graham; he was insured with defendants. I went to him to get a risk; he agreed to insure. When I drew up the paper of the Isolated Risk, he said he wished to insure with the defendants. He refused to insure with the Isolated Risk. I called on Mr. Gillespie in July, 1871. I was acting for both companies up to the time of my resignation. I may have told Gillespie that I preferred the Isolated Risk Company. I gave people their choice of either Company. I did not tell Mr. Graham, as far as I can remember, that I was agent for several companies. I told people in July I had resigned as agent for defendants. I did not tell Mr.

Ogilvie that the defendants' Company was no good. I took a good many insurances from defendants' Company to the Isolated Company, but I did not get as many after the advertisement was published. I did not ask defendants to withdraw the advertisement."

Re-examined. "I did not in a single instance represent that I was agent for defendants after I had resigned. I think it was more than a year after my resignation that I saw Mrs. Martin. It was in the fall of 1872 I saw her. I saw Graham in the fall of 1871. I told him I was agent for the Isolated Risk. He said he had intended to insure with the defendants, but he did not think it made any difference."

The defendants' counsel then objected that no evidence had been given to affect the defendants, because the resolution of the Directors had not been put in, or secondary evidence given of it. The objection was overruled.

For the defence were called :

John Graham, who said : "I was insured twice in defendants' Company. I insured through Mr. Willis. Plaintiff came to me in October, 1871, to get me to insure. I knew he had been an agent of defendants. I did not then know he had ceased to be their agent. He asked if I was insured. I said no. He asked me if I wished to insure. I said I did not know whether I would insure then or not. I said if I insured I wished to do so under Robert Willis. I knew he was an agent of defendants. Plaintiff said I might as well insure with him ; it would make no difference. He was in the field. We then went into the house ; plaintiff insured me ; he told me to sign my name to it. I did so. I then told him to read it over to me. After he read it, I said I understood I was insuring with the Whitby Company, and I would withdraw it. He said, ' You have signed your name, and you can't help it.' I did not withdraw. He said I was better off. The defendants were making too many calls, and the farmers did not like it. If he had told me it was with the Isolated Risk he wanted me to insure, I would not have done so."

Cross-examined.—“Plaintiff did not tell me in the field what Company he was insuring for. He may have said to insure with him would be just the same or just as good. He did not say in the field, ‘it would make no difference.’ I do not read. After insuring with plaintiff, I saw him on the road. I do not remember what took place. I did not say to him he had not deceived me; that I had deceived myself.”

Grace Martin said: “I was insured in defendant’s company. Plaintiff had insured me. When the time to renew arrived, the plaintiff came. It was last fall, (1872). My husband was in the field. I asked if it was to renew the insurance. He said Yes. I said it was renewed. He said it was too bad of them, they had gone ahead of him. I did not know he had changed from being agent of defendants. I told Mr. Bickell of this. It was when speaking to Mr. Bickell that I first knew plaintiff had ceased to be defendants’ agent. Plaintiff said nothing of any other Company to me.”

Malcolm Gillespie said: “Plaintiff applied to me in the fall of 1871, to effect an insurance. We did not agree. We talked of Insurance Companies. He disapproved of Mutual Companies altogether. He told me he would have insured me in either of the Companies, but he preferred the Isolated Risk.”

In reply, the plaintiff said: “I saw Graham after insuring him. I asked if he had told any one I had insured him deceptively; he said he had not, nor did he now say I had done so; that he would have insured in defendants’ Company, but as I had insured him in the Isolated Risk, it made no difference. I told Mrs. Martin I was not insuring for defendants, and that I was insuring for the Isolated Risk.”

A letter of plaintiff to *The Ontario Reformer* was put in, referring to the defendants’ advertisement, which among other things, said, “I deny the charge; and now call on them to prove the charge, or stand convicted of slander.”

The learned Judge directed the jury that it was for them to say whether they thought the advertisement was

a libel, and he explained to them what in law would constitute a libel; and he concluded, "I shall tell them, that if they think the defendants are guilty, they may and should take into consideration the conduct of the plaintiff in considering the question of damages.

The defendants' counsel objected to the charge, contending that the learned Judge should have told the jury that if they believed Mrs. Martin's account of the transaction, the plea of justification was proved. The learned Judge noted: "I did not tell the jury so, because I do not think that her evidence proves the plea." The objection as to the want of proof of the resolution was also renewed as an objection to the charge. The jury found for the plaintiff, as before stated.

In this Term, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a new trial had, the said verdict being contrary to law and evidence, and for misdirection of the learned Judge, and for excessive damages, the misdirection being, that the learned Judge did not tell the jury that the defendants were not liable, and that he told the jury there was no evidence to sustain the plea of justification, and that the resolution of the Directors appointing the President and Secretary of the Company to draw up the advertisement in which the libel was contained, did not require to be produced by the plaintiff.

Harrison, Q. C., shewed cause. The learned Judge could not tell the jury the defendants were not liable. He directed them properly what a libel was, and they found the publication to be a libel. He was not asked to say nor to tell the jury whether the words complained of were or were not a libel, nor was any nonsuit asked for on the ground that they were not, or could not be a libel. If the Judge had ruled the article was not a libel, he would have been interfering with the province of the jury, and then the plaintiff might have had to complain of a misdirection: *Parmiter v. Coupland et al.*, 6 M. & W. 105;

O'Brien v. Clement, 15 M. & W. 435; *Fray v. Fray*, 17 C. B. N. S. 603. The publication is plainly libellous, for it charges the plaintiff with making false statements; that is, with being a liar. The case had to go to the jury, with a direction just such as was given: *Baylis v. Lawrence*, 11 A. & E. 920; *Campbell v. Spottiswood*, 3 B. & S. 769, 781; *Cox v. Lee*, L. R. 4 Ex. 284; *Hoare v. Silverlock*, 12 Q. B. 624; *Boydell v. Jones*, 4 M. & W. 446; *Mawe v. Piggott*, 4 Ir. Rep. C. L. 54; *Tearcy v. McKenna*, *Ib.* 374; *Starkie on Libel*, 3rd Ed., 193 to 204. As to the plea of justification: the evidence of Gillespie was of no moment, for what he said the plaintiff had said to him was spoken at a time when the plaintiff was still the agent of the defendants. And as to Mrs. Martin, the plaintiff made no such statement to her as is alleged in the plea. There remains then only what Graham said, and it does not prove the facts which justified the publication. As to the non-production of the resolution, there was no evidence strictly to prove there ever was such a resolution; but if there were, it was not necessary to produce it. Secondary evidence at any rate was given of it without objection, and part of the objection at the trial was, that no secondary evidence was given of it. There are no degrees of secondary evidence. The damages were not too great. The justification pleaded and insisted upon, yet failed to be proved, may have enhanced the amount, and it was proper it should: *Eakins v. Evans*, 3 O. S. 383; *Miller v. Houghton*, 10 U. C. R. 348; *Fawcett v. Booth*, 31 U. C. R. 263; *Gfroerer v. Hoffman*, 15 U. C. R. 441.

M. C. Cameron, Q. C., supported the rule. The damages are excessive, for, among other grounds, the plaintiff in his printed article in *The Ontario Reformer*, in reference to the alleged libel, did not deny he had made the statements which it was said he had made. He merely denied "making false statements." It was not shewn he had sustained any injury. The publication was at any rate privileged, and therefore not a libel. It is true the

learned Judge's attention was not drawn to that view of the case at the trial. The following cases shew that it was privileged: *Regina v. Bealey*, 4 F. & F. 117; *Chalmers v. Shackell*, 6 C. & P. 475; *Willmett v. Harmer*, 8 C. & P. 695; *Prior v. Wilson*, 1 C. B. N. S. 95.

The learned Judge should have left the evidence as the justification to the jury, and should not have ruled there was no evidence to sustain it. Mrs. Martin proved that the plaintiff, who knew her husband had been insured with the defendants, came to her and asked her to *renew* her policy; and Graham, who had also been insured with the defendants, and wished to insure again with them, and thought he was doing so, and that the plaintiff was their agent, was induced by him to insure with the Isolated Risk Company. It could not be said there was no evidence at all in support of the plea; yet it was wholly excluded. The objection at the trial is, that no secondary evidence was given of it as there should have been: *Doe Gilbert v. Moss*, 7 M. & W. 102; *Taylor on Evidence*, 6th ed. sec. 495.

WILSON, J., delivered the judgment of the Court.

The publication of the defendants headed "Caution," and proceeding "notwithstanding the false statements of Daniel Holliday to the contrary, he is no longer an agent of the Company," may or may not be libellous in law.

The cases of *Hoare v. Silverlock*, 12 Q. B. 624; *Boydell v. Jones*, 4 M. & W. 446; and *Campbell v. Spottiswood*, 3 B. & S. 769, may be referred to on that point.

In *Fray v. Fray*, 17 C. B. N. S. 603, it is said, to write of one, that she had for years without cause systematically done everything to annoy the defendant, and had unnecessarily dragged him into the Court of Chancery, and put him to great expense, was on demurrer held libellous.

Erle, C. J., said: "That which may tend to lower the plaintiff in the estimation of others we cannot withhold from a jury * * We cannot take upon ourselves to hold that the letter in question can under no circumstances be libellous. The matter must go before a jury."

In *Cox v. Lee*, L. R. 4 Ex. 284, it is said that it is a libel to charge a man with ingratitude, although the facts are at the same time stated and do not support the charge; and the Chief Baron was of opinion that an untrue statement that a person was at a past time in pecuniary difficulties may also be libellous, although it is stated these difficulties have been surmounted.

And in *Regina v. Coghlán*, 4 F. & F. 316, to advertise of one that he is indebted in a large sum, and to offer the debt for sale, is not necessarily libellous. The Judge on an indictment cannot withdraw it from the jury, but must leave it to them, reserving for a motion in arrest of judgment, whether the words can possibly be libellous.

The Judge could not, therefore, on this trial, have held, even if he had been desired to do so by the defendants' counsel, which he was not, that the publication could in no way be libellous.

It is and must be derogatory to any man to publish a *caution* of him, and to charge him with making *false statements* of his being still an agent of the defendants.

Libel or no libel may be a question of law, as appears by the demurrer in *Fray v. Fray*, 17 C. B. N. S. 603, and the motion which might be made in arrest of judgment on the record: *Baylis v. Lawrence*, 11 A. & E., per Lord Denman, at p. 925; *Regina v. Coghlán*, 4 F. & F. 316.

The words must be set out, in order that the Court may judge whether they constitute a libel or not: *Wright v. Clark*, 3 B. & Al. 503; see also *Parmiter v. Coupland et al.*, 6 M. & W., per Alderson, B., at p. 106.

And Kelly, C. B., says in *Cox v. Lee*, L. R. 4 Ex. at. p. 289: "But it is only when the Judge is satisfied that the publication cannot be a libel, and that if it is found by the jury to be such their verdict will be set aside, that he is justified in withdrawing the question from their cognizance."

The defendants' counsel did not put forward the defence that the libel was a privileged publication.

That the defendants might properly caution the public

against dealing with any one as their agent, or not to believe his statements that he was their agent, as a matter affecting their interests and perhaps their responsibility, is, I think, plain. Of course the publication should be made in good faith, and for the purpose of protecting their interests, and not with any view of injuring the plaintiff: *Fondin v. Westlake*, 1 M. & W. 461; *Henwood v. Harrison*, L. R. 7 C. P. 606. And strong language may be used if warranted by the facts: *Hunter v. Sharpe*, 15 L. T. N. S. 421; or if absolutely necessary for the purpose.

The case was not, however, rested on the ground of privilege, as I think it might have been.

The real defence which was made at the trial was on the plea of justification: that the plaintiff "did after he left the service of the defendants, and while he was no longer employed by the defendants, state to several persons, and amongst others, to Malcolm Gillespie, and John Martin, that he was still an agent of the defendants."

John Graham's evidence shews, that in October, 1871, the plaintiff applied to him to insure. Graham believed the plaintiff to be still acting for the defendants. Graham signed the application which the plaintiff drew up, believing it was for a risk with the defendants. The plaintiff at Graham's request, he not being literate, read the application to him. Graham found it was for an insurance in the Isolated Risk Company, and he wanted to withdraw, but he said the plaintiff would not let him.

Mrs. Martin stated, that the plaintiff having, as agent for the defendants, insured her husband before, called upon her in the fall of 1872, when the time to renew the policy came round; that she asked the defendant if it was to *renew* the policy he came about, and he said, yes. She said it was renewed, and the plaintiff said it was too bad of them (the defendants), they had gone ahead of him. She then believed the plaintiff was still acting for the defendants.

And these facts were communicated to the defendants.

The plaintiff denied having spoken to Mrs. Martin about *renewing*, or having said "it was too bad of them; they

had gone ahead of him," and he denied having dealt with Graham in the character of agent of the defendants in any way.

These were all disputed facts. If they or any of them sufficient for the purpose were proved, they would support the plea. The statement of the learned Judge, that he did not think Mrs. Martin's evidence proved the plea, may have led the jury to think they might disregard her evidence without some further statement that they were nevertheless to consider her evidence, and that the learned Judge would, upon their finding with respect to it, determine in what way the case should then be dealt with. The way in which the case was left to the jury may have induced the defendants' counsel to suppose the evidence of Mrs. Martin had been actually withdrawn from the jury.

There may, therefore, have been a miscarriage of the cause, and the case must go again to a jury.

It is of no moment saying anything of the necessity of producing or not producing the resolution. The plaintiff's counsel can produce it, if he please, at the next trial. Nor need we say anything of the damages.

The rule must be absolute to set aside the verdict, and for a new trial without costs.

Rule absolute.

From this judgment the plaintiff appealed to the Court of Error and Appeal, and the argument was heard on the 13th January, 1874 (a).

Harrison, Q.C., for the appellants, urged the points taken in the Court below, and cited the following cases in addition to those then referred to:—As to the Judge's charge: *Green et al. v. Bateman*, L. R. 5 H. L. 591; *Annable v. McDonell et al.*, 8 U.C. R. 382; *Braid v. G. W. Ry.*, 1 Moore P. C. N. S. 101. As to the proof of the plea of justification: *Weaver v. Lloyd*, 2 B. & C. 678; *Morrison et al. v. Harmer et al.*,

(a) *Present*.—DRAPER, C. J., of Appeal, RICHARDS, C. J., SPRAGGE, C., HAGARTY, C.J.C.P., GALT, J., STRONG, V.C., and BLAKE, V.C.

3 Bing. N. C. 759; *Prior et al. v. Wilson*, 1 C. B. N. S. 95; *Regina v. Gowan*, 7 C. P. 136; *Davis v. Stewart et al.*, 18 C. P. 482; *Davis v. Stewart*, 28 U. C. R. 441. As to the production of the original resolution: *Hall v. Ball*, 3 M. & G. 242. As to the effect of the *innuendo*: Consol. Stat. U. C. 103, sec. 2; *Black v. Alcock*, 12 C. P. 19.

M. C. Cameron, Q. C., for the respondents. This is not a case for appeal. The power to grant a new trial here was one of discretion, and will not be interfered with: Consol. Stat. U. C. ch. 13, sec. 26. He also urged the points taken by him in the Court below.

Harrison, Q. C., in reply. Consol. Stat. U. C. ch. 13 sec. 26, does not apply, as the motion for a new trial was not simply to the discretion of the Court. This case comes within sec. 24. He referred also to *Fryer v. Kinnersley*, 15 C. B. N. S. 422.

It appeared during the argument that there was a misunderstanding between the counsel as to what took place at the trial, and whether there had been any misdirection or not, or any withdrawal of evidence.

DRAPER, C. J., OF APPEAL, delivered the judgment of the Court (*a*).

We are all of opinion that the appeal should be dismissed without costs. There was plainly a misunderstanding as to what took place at the trial. We offer no opinion on the merits on either side.

Appeal dismissed without costs.

(a) On the 14th January, 1874. *Present*.—DRAPER, C. J. of Appeal, RICHARDS, C. J., SPRAGGE, C., HAGARTY, C. J. C. P., GALT, J., STRONG, V. C.

WATTS V. ROBSON.

Mill privilege—Diversion of water—Agreement to put in improved wheels.

Declaration, that the Grand River Navigation Company, having acquired the right by Statute for that purpose, demised to W., of whom plaintiff is assignee, certain land in B., together with a sufficient supply of the surplus water to be taken from the said Company for four run of stones: that the plaintiff is occupant of a mill on the premises, which he could if not interfered with, and has been accustomed hitherto to run with the surplus water so granted; but the defendant has on divers occasions wrongfully and injuriously diverted from plaintiff's mill large quantities of said surplus water, &c., whereby, &c.

Plea—That at the time of the committing of the alleged grievances defendant was, and now is lessee of part of said Company's reserve lands, and had a right under said Company to use enough of the surplus water from the said canal to propel two run of stones in a mill on said land: that defendant had in his mill the same kind of wheels which plaintiff now has in his; and it was agreed between them, in consequence of the scarcity of water, that defendant should put in his mill wheels of the best and most improved principles, or Leffel wheels, and that the plaintiff, in consideration thereof, would, in a reasonable time put in his mill similar wheels, in order to save water and facilitate the working of said mills: that defendant accordingly put said wheels in his said mill, at great expense, but plaintiff did not put in similar wheels, although a reasonable time elapsed; and that after putting in the said wheels defendant took sufficient and no more than enough water to run his two run of stones, and after taking such water for said purpose there was sufficient surplus water for plaintiff to run his four run of stones with water wheels constructed according to the said agreement; but the plaintiff's wheels were inferior, and used a large quantity of water in excess of what he would have needed for wheels according to the agreement; and the breach in the declaration alleged was caused solely by plaintiff's non-performance of said agreement.

Held, plea bad, for want of an averment that defendant did not use less or no more water with his new wheels than he was entitled to use with his old wheels under his lease.

Per Wilson, J., with this averment the plea would shew a substantial defence at law.

Per Morrison, J., the agreement would be a substantial defence if it contained a stipulation that if defendant put in the new wheels he might use as much water as they required without restriction by plaintiff.

DEMURRER.—Declaration, first count, that the Grand River Navigation Company having acquired the right to demise, did by indenture of the 5th of May, 1851, demise to John Aston Wilkes and his assigns, certain land in the Town of Brantford, containing one acre, two roods, and twenty-five perches; (reserving a road through the pre-

mises, and the right to cut a tail race through the premises if required,) together with a sufficient supply of the surplus water to be taken from the waters of the said navigation company for four run of stones, at the yearly rent and subject to the conditions and provisions in the lease, for twenty-one years, fully to be complete, to be computed from the first day of January, 1851; and at the expiration of the said term of twenty-one years for another term of twenty-one years immediately thereafter, and so on from one term of twenty-one years to another; unless before the expiration of any of the said terms the company, or their assigns, should demand higher or additional rent, &c.

The declaration then averred the entry of lessee, and an assignment by him to Bunnell, who assigned to Greer & Clement, who assigned to the plaintiff. It averred also, that neither the company nor the plaintiffs, to whom all the estate, rights and interest of the company had been conveyed and transferred, had given any notice demanding a higher and additional rent: that the plaintiff was the occupant of a flouring mill, so situated on the demised premises that he could, if not interfered with, readily run the same by means of the said surplus water, and he had been accustomed to run the said mill by such water; but the defendant on divers occasions, wrongfully disregarding the said grant of water so vested in the plaintiff, diverted from the plaintiff's mill large quantities of the said surplus water, to which the latter was entitled by virtue of the lease and assignments, and prevented the plaintiff from enjoying or obtaining the use of the said surplus water, whereby, &c.

Fifth plea to the first count: that at the time of the committing of the alleged grievances, the defendant was possessed of a term which is not yet expired, under the said company, of a portion of the said company's reserve lands, and had the right under the said company to use a sufficient supply of the surplus water to be taken from the said canal for the purpose of propelling two run of stones for gristing, in a certain grist mill erected on

the said land possessed by the defendant as aforesaid ; and that during the said term, and before action brought, the defendant had in his said mill the same description of wheels the plaintiff now has ; and it was then agreed by and between the plaintiff and the defendant, in consequence of the scarcity of water in the said canal, that the defendant should erect and put in the said mill of the defendant wheels of the best and most improved principles, or Leffel wheels, and that, in consideration of the defendant so erecting and putting in the mill of the said defendant wheels of the best and most improved principles, or Leffel wheels, he the plaintiff, would erect and put up within a reasonable time thereafter in the plaintiff's mill, wheels of the best and most improved principles, or Leffel wheels, for the purpose of saving a large quantity of the waters of the Grand River Navigation Company, and affording facility for working and running the said mills ; and the defendant, in pursuance of the said agreement, did put in the said wheels in his the defendant's mill, and was put to great expense in and about the erecting and putting up thereof, and the plaintiff has not, in pursuance of the said agreement, erected or put up in his said mill the said wheels on the best or most improved principles, or Leffel wheels, although all conditions were fulfilled, and all things happened, and a reasonable time elapsed in that behalf before the grievances in the declaration mentioned arose ; and that after the defendant had so put in the said wheels, he took from the surplus waters of the said Navigation Company, sufficient water, and no more, for the purpose of running two run of stones for gristing with said wheels, which is the grievance in the first count complained of ; and that after the taking of the said water for the purpose aforesaid there was sufficient surplus water for the plaintiff to run four run of stones with water wheels constructed according to the said agreement, but the plaintiff's water wheels were not constructed according to said agreement, but were inferior wheels, and from that cause, and from that cause alone, the plaintiff used a large quantity of the surplus

waters in excess of the quantity that would have been necessary to run four run of stones with water wheels constructed according to the said agreement; and defendant further avers, that the breach in the declaration mentioned arose after a reasonable time had elapsed for the performance by the plaintiff of the said agreement, and was caused solely by the plaintiff's non-performance thereof.

Demurrer to the plea, because the breach of the alleged agreement in the plea set forth did not operate as a grant of the water to the defendant, but at most gave the defendant an action for damages against the plaintiff for the breach thereof, and because the plea admits the plaintiff's claim, but does not avoid it.

Lash, for the demurrer. The pleadings shew the plaintiff was and is entitled to his supply of water before the defendant was entitled to use any of it. A mere verbal agreement is set up in answer to the cause of action, and in reduction of the plaintiff's rights in real property, which cannot be. The legal effect of what is claimed is a grant; but no valid grant is shewn here. A deed is not pleaded; nor is there a sufficient license. The plea does not go to the whole cause of action, but to the damages only. The mere setting out of facts in a plea, but not relying on them as a defence, will not constitute a defence: *Burton et al. v. The Gore District Mutual Ins. Co.*, 14 U. C. R. 342, 356.

M. C. Cameron, Q. C., contra. The plaintiff's only right to the water is that which he has from the navigation company. If the defendant has injured the plaintiff, or affected his rights the plaintiff should look to the company for redress on his covenants, expressed or implied. It is not a common law right which is relied on here. The defendant shews he has as good a right to the water as the plaintiff has. [*Lash*, that is equivalent to not guilty.] If so, it is an answer. The defendant has done what he agreed with the plaintiff to do; the plaintiff is the one who is in default. The agreement is a good answer. The defendant contends

the plaintiff had no right to the use of the water, or if he have, he has no better right than the defendant.

MORRISON, J.—The plea does not shew the commencement of the defendant's term, whether anterior to or after the grant of the plaintiff, or the position of the defendant's mill, whether above or below that of the plaintiff.

It is not easy to see in what way the pleader intended to rely on the facts pleaded as a defence.

During the argument, I was inclined to think the plea might be viewed as an informal plea of leave and license; but I do not think, after examining it, that it can be so treated.

As an answer to the declaration the defendant says, that there being a scarcity of surplus water passing from the canal, for the purpose of saving or economising water, it was agreed that each party should put in their respective mills Leffel wheels: that in pursuance of the agreement, the defendant put in his mill such a wheel, and that the plaintiff neglected to do so: that he, the defendant, after putting in such new wheel, used no more water than was sufficient to drive his two run of stones with such wheel, and which he says is the grievance the plaintiff complains of, averring that there was sufficient water, besides the water so used by the defendant, to run the plaintiff's mill with four run of stones driven by the same kind of Leffel wheel, and that the plaintiff, by reason of his not putting in a Leffel wheel, used more water than he would have used if he had put in a Leffel wheel according to his agreement.

It is not averred or shewn that by using the Leffel wheel the defendant, in fact, used less or no more than he was entitled to use under his lease, or that if the plaintiff had used a Leffel wheel he would have used or required less than his grant originally authorized him to use.

The complaint of the plaintiff is, that the defendant diverted or used water which the plaintiff was entitled to by his grant from the canal company.

The agreement, as pleaded, does not authorize the defendant to use or divert any of such water.

I see no legal inference to be drawn, as the plea stands, that by the performance by the defendant of his part of the agreement, and a breach of it by the plaintiff, the defendant was justified in diverting or taking more water than he was originally or previously entitled to under his lease, or in any way interfering with the right of the plaintiff to the water; or that we can infer that he, the defendant, used no more water than he was entitled to by his lease.

If it appeared that the agreement contained a stipulation that if the defendant put in the Leffel wheel, that in such case the defendant would be entitled to take or use as much of the water as would drive his two run of stones, without any restriction, the plaintiff could not complain if the defendant interfered with the working of his mill.

But no such stipulation appears; it is merely an agreement that each should put in Leffel wheels, without any provision or condition affecting their respective rights to the user of the quantities of the surplus water they were entitled to by virtue of their respective leases, or that those rights in any way or in any event might be either lessened or increased.

What I conjecture to have been the intention of the parties, although it does not so appear, is that being of opinion that by the use of Leffel wheels they could work their respective mills more advantageously with the water each was entitled under their respective leases to use—that is, supposing they could with the original wheels only work their respective mills six hours in the twenty-four, and that with the Leffel wheels they could work them ten hours—they mutually agreed to put in Leffel wheels; not with a view of depriving either of the quantity of water he was entitled to, but that they could more readily regulate the working of the mills, and the more accurately determine their respective rights to the use of the water, which could not be so well ascertained or regulated if only one of the mills used a Leffel wheel.

On the whole, I cannot see in this plea any justification for the defendant diverting water from the plaintiff's mill,

and I think the plaintiff is entitled to judgment on the demurrer.

WILSON, J.—The plea does not allege that the new wheels in fact used less or no more water than the former wheels in the defendant's mill used ; or that the defendant, after the new wheels were put in, used less or no more water for the mill than before, although he says he took sufficient and no more for the purpose of running two run of stones for gristing with the said wheels.

The plea does say, that in consideration the defendant would put the improved wheels into his mill, the plaintiff agreed to put them into his mill, for the purpose of saving a large quantity of the water, and affording facility for running and working the two mills.

That reads as if the plaintiff were to put in the new wheels to save the water for the two mills, and not as if it were any part of the defendant's engagement, or any purpose of his, to economise the water by the new wheels he put in ; although, as a fact, it must have been intended the defendant should help in saving the water ; for to effect the object which was intended, to save water for the two mills, economy must be observed by both the parties.

If the plaintiff have a right prior to the defendant to the use of the water, and is entitled to maintain this action, the plea I think will be defective for not alleging that the quantity of water the defendant took after putting in the new wheels, although not more than sufficient for running two run of stones for gristing with such wheels, was not more than the defendant had theretofore used. See *Saunders v. Newman*, 1 B. & Al. 258 ; *Drewett et al. v. Sheard et al.*, 7 C. & P. 465.

The defendant has not excepted to the declaration, so he is not in a position to argue upon its sufficiency or insufficiency ; the Court may, however, consider the sufficiency of the declaration.

The declaration alleges, that the Grand River Navigation Company having acquired by Statute the right to let the

tenements and easements thereafter mentioned, did by deed demise certain land therein described to a person from whom the plaintiff alleges title, together with a sufficient supply of the surplus water, to be taken from the waters of the Navigation Company, for four run of stones.

By the Statute that is a good title to the plaintiff, and the Company could not and cannot, nor can the defendant, who is now in the place of the Company, derogate from the lease and grant so made; nor can the Company confer upon the defendant the right to interfere with the plaintiff's grant and privileges.

It may be, that the Company or the plaintiff may be liable for a breach of covenant, express or implied, by the demise so made to the defendant. That will depend upon what the actual rights and engagements of the respective parties are towards each other, but that will not relieve the defendant from liability to the plaintiff for his direct wrongful act towards the plaintiff.

The defendant may have a good title, subject to the plaintiff's prior grant or license. The two instruments stand well together: *Carr v. Benson*, L. R. 3 Ch. App. 524.

The defendant has not denied the title of the plaintiff at all, and it must be assumed he has a good title as he has alleged, and the right under that title he says the defendant has infringed upon.

The defence set up is, that before the grievances it was agreed between the parties, in consequence of the scarcity of water in the canal, that the defendant should put into his mill the improved wheels, and the plaintiff, in consideration of that—that is, of the defendant putting in such new wheels—agreed to put the improved wheels into his mill, for the purpose of saving a large quantity of water for the two mills; and that the defendant at great expense put the new wheels into his mill, but the plaintiff did not put them into his mill; that the defendant took no more water than was sufficient to drive the two new wheels, and after doing so there was sufficient surplus water for the plaintiff's four run of stones with wheels according to the agreement.

That shews an assent by the plaintiff to the defendant to take as much water from the surplus water of the canal to drive the improved wheels in his mill for two run of stones, less than or not more than the defendant took before, and after the plaintiff had or should have had his full quantity of water with the improved wheels to drive his four run of stones.

The defendant, as before stated, has not made the necessary averment as to his not now using less water or not more than he used before ; but subject to that defect is the *agreement* a valid one ?

The water to be taken by the defendant is not the plaintiff's property. It is water which he would have a right to appropriate to his necessary purposes under his lease when it came to his mill or mill works.

The license, or right or power, is not to be exercised by the defendant on the plaintiff's land or property, but with respect to water which is at the defendant's property or mill when he appropriates it.

If the plaintiff had agreed that the defendant should erect a mill with six run of stones, and that the defendant should, without any let of the plaintiff, take of the surplus water as much as he required to drive such mill, he could not, after the defendant had built the mill, and appropriated the water, detract from his license.

The license in question differs only in degree, and not in principle, from the one supposed. And *Liggins v. Inge et al.*, 7 Bing. 682, is authority, in my opinion, that in such a case the defendant cannot be sued for continuing the use of his improved wheels.

If the plaintiff had agreed, that the defendant should put in four run of stones to his present mill, and take such water as was required to drive them, he could not complain of the continued user of that portion of the water.

I do not see, after the cases of *Winter v. Brockwell*, 8 East 308 ; and *Liggins v. Inge et al.*, 7 Bing. 682 ; that it can be necessary to plead the defence as an equitable one, as was done in *Davies v. Marshall*, 10 C. B. N. S. 697.

The demise of the flow or right of water is a grant, not a mere license; *Nuttall v. Bracewell*, L. R. 2 Ex. 1; *Wood v. Leadbitter*, 13 M. & W. 838.

The right to the flow of water is not an easement, but a natural right; *Stokoe et al. v. Singers*, 8 E. & B. 31, per Erle, C. J. 36; *Mason v. Hill et al.*, 5 B. & Ad. 1.

The plea, in substance, affords a good defence. The defendant claims the benefit of the agreement under which he made the special adaptation in his mill to meet the wishes and requirements of both parties in the user and enjoyment of the water, in which as mill owners they were both interested.

Whether the plaintiff choose to take the benefit of the improved wheels, or do not, is his business only. The defendant says, if he do he will have no ground of complaint.

The only doubt I feel is, whether the plea should be pleaded as an equitable or as a legal defence. I think it is good as a legal defence. But if there be a doubt of it, the defendant may choose to plead it as an equitable plea, if he choose to amend, as I think he must, by expressly averring that his new wheels do not use more water than the former wheels did.

It is very probable the defendant might maintain an action against the plaintiff for not altering his wheels, if by reason of such refusal to alter them the defendant is prevented from having the supply of water which he otherwise would have, and the supply which he has is from the plaintiff's default insufficient for the defendant's mill.

In my opinion, for the reasons given, there must be judgment on demurrer for the plaintiff.

Judgment for plaintiff.

SCOTT ET AL. V. MIDLAND RAILWAY OF CANADA.

R. W. Co.—Equality of charges—Undue preference—Consol. Stat. C. ch. 66, sec. 25.

In 1865 and 1866, defendants charged plaintiffs' testator and other lumber dealers at Lindsay, \$1.60 per M. feet to carry lumber over their line to Port Hope; in 1867, \$1.90, which was authorized by defendants' by-law passed in that year, and sanctioned by the Governor in Council; and in 1868, 1869, and 1870, \$1.80. In 1865 and 1866 defendants carried lumber for certain lumber dealers at Port Perry, 30 miles beyond Lindsay, from Port Perry to Port Hope at \$2.00 per M., the defendants paying the steamboat charges for carriage between Port Perry and Lindsay, and the harbour dues at Port Hope, which left \$1.38 net to defendants for the carriage from Lindsay to Port Hope. This arrangement was made in order to obtain the Port Perry trade, which would otherwise have gone by waggon to Whitby, and the same terms were offered to all shippers at Port Perry. In 1867, 1869, and 1870, the arrangement with the Port Perry dealers left for the same service \$1.65 net to defendants; and in 1868, \$1.55. In 1870 defendants entered into special contracts with several dealers to carry for different terms of years at \$1.50 per M. from defendants' wharf in Lindsay to the wharf at Port Hope all the lumber that the dealers might manufacture for the American market, or for delivery at the Port Hope wharf. The testator declined such a contract, which was open to all dealers, and paid \$1.80 under protest. These contracts were made by defendants in order to secure the freight from a new road which was about to be opened from Port Perry to Whitby. Plaintiffs having sued defendants on the common counts for the freight paid by their testator from 1865 to 1870 inclusive, from Lindsay to Port Hope, in excess of that paid by the Port Perry dealers to defendants for carriage over that distance:

Held, that defendants were justified in entering into the general arrangement with the Port Perry dealers from 1865 to 1869, and the contracts in 1870; and that there was no evidence to shew that the Port Perry dealers gained any "undue advantage" under the arrangement or contracts over plaintiffs' testator, within the meaning of section 25 of "*The Railway Act*," C. S. C. ch. 66.

Held, also, that to support the action, it should have been shewn clearly, and not left to inference, that plaintiffs' testator was prejudiced in fact.

Semble, that until the By-law was passed defendants had no right to levy any tolls, but were only entitled as common carriers to a reasonable compensation.

DECLARATION on the common counts.

Plea: Never indebted.

The cause was tried before Wilson, J., at Peterborough Assizes, 1872, with a jury.

This was an action by the executors of a mill owner and lumber dealer in his lifetime residing at Lindsay, to recover the amount paid by him for carriage of lumber during the

years 1865 to 1870, from Lindsay to Port Hope, in excess of that charged to others during the same time for the like carriage.

On the trial, Mr. *Gray*, the secretary of the defendants' Company, stated that he had been secretary from 1865 or 1866, and he produced an order of the Governor in Council, fixing the tolls, dated 13th May, 1867. By it the freight on lumber from Lindsay to Port Hope was \$1.90 per M. He stated there was no by-law previous to March, 1867; that there was previous to 1870 no difference in charges for freight on lumber except to the people at Port Perry, that place being situate on Lake Scugog in the rear of Whitby, and not on the line of railway. The lumber at Port Perry had been previously hauled in waggons between 20 and 30 miles to Whitby, a shipping Port on Lake Ontario. That which was induced to pass over the defendants' line, was taken down the Scugog river in vessels and scows and landed at Lindsay, and from thence to Port Hope. The first lumber shipped from Port Perry that way was carried by defendants in 1865. From 1867 to 1870, the Port Perry dealers were charged \$1.60 a thousand feet, which was paid to the witness, and he paid the shipping agents 25c. for commission per M. That left to the company a net freight of \$1.35; that is, as the witness said, the defendants received \$1.60 and paid the 25c. by a separate payment, which 25c., the secretary believed, went to the Port Perry dealers; and he named some six dealers in lumber there who entered into these arrangements, which were made with the Port Perry people in order to get the lumber from Port Perry over the defendants' road, and out of its usual and natural channel, by the route to Lake Ontario by Whitby, and so to make business for the road; and that it was with a view to the interests of the defendants' railway that the arrangements were made, being freight they could not have had except for these charges and arrangements; in which arrangements the Port Hope Harbour Company assisted, by deducting five per cent. in their shipping tolls on such lumber. The witness stated

that these were the only exceptional contracts made by the defendants until 1870. He produced some nine contracts in writing and under seal with different persons and firms, all entered into in the spring of that year, by which the defendants agreed to carry, (during terms of 4, 5, and 10 years) all the lumber that the parties manufactured for the American market or for sale and delivery at the Port Hope wharf, at \$1.50 per M. feet, board measure, from the defendants' wharf in Lindsay, to the wharf at Port Hope; agreeing that if defendants charged a less sum to any persons during the term, from the same wharf to the same wharf, that the parties should only pay the reduced rate. And the parties covenanted, in consideration thereof, to send all the lumber they would manufacture for the American market or for sale and delivery at the Port Hope wharf, over the defendants' railway, for the terms respectively mentioned in their contracts, and pay the said sum of \$1.50 per M. feet. The witness said that on the 31st January, 1870, a letter was sent to the testator offering to carry his lumber at \$1.50 per M. on the same terms as were offered to and made with the other parties, which he declined; and that the defendants never refused to make similar contracts with any other parties willing to make such arrangements

Mr. *Sexton*, one of the Port Perry dealers in lumber, testified that he shipped lumber over defendants' road to Port Hope: that in 1865, the arrangement was to pay defendants \$2 per M. f. o. b. to Port Hope, the defendants paying the steamboat charges to Lindsay, and the harbour dues at Port Hope, the witness loading at Port Perry, unloading and reloading at Lindsay, and unloading at Port Hope, and shipping it on vessels there: that the steamboat in Lake Scugog did not belong to defendants: that after paying the steamboat charges and the harbour dues, there would be over \$1.38 to the defendants per M. During 1866, the same arrangement continued. In 1867, the witness's shipping agent at Port Hope made an arrangement with defendants to receive a commission of 25c. per M. on

the freight: the agent was to pay witness that commission, the freight being \$1.90 per M., leaving to the defendants net \$1.65. In 1868, the rate was \$1.90, with the 25c. off, and a draw-back of 10c., making the net amount to defendants of \$1.55. In 1869 and 1870, the 10c. was not allowed, and the net freight was \$1.65. The witness also stated that the usual and customary way for the lumber to go to Lake Ontario from Port Perry was by Whitby, and the lumber would have gone that way if such arrangements had not been made by the company: that it was hard to say which route it would take, the difference in cost was so slight: that the arrangements made were an advantage to the Port Perry dealers, as they could make larger shipments, and the lumber was not so damaged by rail as by waggon: that it cost from \$2.00 to \$2.25 per M. to haul from Port Perry to Whitby.

Other Port Perry dealers were examined, who gave like testimony. It appeared that the distance from Port Perry to Lindsay was about 30 miles, and the steamboat charges were 40c. per M., and the Port Hope harbour dues 25c.; the whole amount paid being \$2.00.

Mr. *Howell* stated that he acted at Port Hope as shipping agent for the Port Perry dealers, and he produced a letter from the defendants' superintendent, dated 11th May, 1869, in which he wrote, "The Railway Company will allow you a commission of 25c. per M. from their regular tariff rate on all lumber you may procure from Port Perry to Lindsay, during the year 1869, the tariff rate being \$1.90 per M. in car loads. The arrangement has reference only to such traffic as you may secure from Port Perry via Lindsay."

The witness said he paid the full freight to the company and received back the 25c. and paid it to the parties he acted for. He said the Port Perry people would not have sent it unless they got the deduction.

Another shipping agent for a Port Perry dealer gave evidence to the like effect.

A shipping agent of the testator was called, who made a

statement of the quantities of lumber shipped by the testator from 1865 to 1870 inclusive, and the rates paid; viz. in 1865 and 1866, \$1.60; in 1867, \$1.90; and in 1868, 1869, and 1870, \$1.80. He said he paid the freight in 1870 under protest, which the testator instructed him to do, claiming the freight at a lower rate, viz. \$1.50 per M. as paid by a Mr. Shaw, one of those who entered into a written agreement for a term of years. This witness said he saw Shaw and others to persuade them to make the contracts of 1870 with defendants; and that he asked testator to come in and make a contract with the others, but that he was not willing to do so. This witness also said that the contracts of 1870 were made with the idea that the Port Perry and Whitby Railroad would be running, and the contracts were to secure the freight for the defendants.

W. A. Scott, a son of testator, stated that his father commenced shipping lumber over defendants' road in 1865; that the defendants charged him more than other people, and that he threatened to proceed against them to recover the overcharge.

On cross-examination, he said he did not know who worked the line in 1865 or 1866; that \$1.60 was charged to testator in 1865, while the Port Perry people paid 25c. less. He stated that the reason why defendants were not sued before was, because they could have bothered him; now they could not, as they could ship by the Whitby and Port Perry road: that he complained every year about the charges; and he stated that he refused to make a contract as the others did, and that he paid \$1.90 in 1870 and 1871.

Mr. Gray was re-called, and stated, that he was put in possession of the defendants' railway in April, 1859, for *Mr. Cumberland*, who was the trustee of the bondholders; and that the line afterwards got into the Company's hands again on the 1st of May, 1866.

The plaintiffs' case being closed, the defendants' counsel moved for a nonsuit; and the learned Judge, having heard counsel on both sides, stated his opinion as to the years 1865 to 1869 inclusive, which relates to the special dealings

with the Port Perry people, that he thought the arrangements so made by defendants were made for their own advantage only, and in order to induce a trade which they would not otherwise have had: that by it, the Port Perry dealers got their lumber to the front for about the same as it would have cost them if they had sent it by Whitby: that the deduction of 25c. per M. feet in their favor was a gain to them, but they had two additional handlings in sending by Lindsay, which they would not have had if they had sent by Whitby. And the learned Judge thought the defendants might offer any inducement to persons to use or employ their line, but not so as to put such persons on better terms than others; and that they could arrange with the Port Perry people to pay them their expense of sending their lumber from Port Perry to Lindsay, but when the lumber got there, they must charge such persons from Lindsay to Port Hope the same rates which they charged to others. And as to the year 1870, the learned Judge was not satisfied that the arrangements then made were objectionable, so far as the plaintiffs were concerned. After some discussion, it was agreed that the plaintiffs should have a verdict for the years 1865 to 1870 inclusive, and a verdict for \$7,057 25c. was entered; the defendants to be at liberty to move to reduce the verdict, or to enter a nonsuit or verdict for them; the Court to deal with the merits of the case, and that the Court might do so in like manner as if the case had been tried by a Judge without a jury.

During last Easter Term, *C. S. Patterson*, Q. C., obtained a rule *nisi* to set aside the verdict for the plaintiffs, and to enter a nonsuit or a verdict for the defendants, or to reduce the verdict by deducting the amount included in respect of the years 1865 and 1870, pursuant to leave reserved.

In Michaelmas Term last, *Blake*, Q. C., and *Armour*, Q. C., shewed cause. This is an action to recover back the excess of freight paid by plaintiffs' testator to the defendants during the years 1865 to 1870, both inclusive, over what the testator would have paid if charged at the rate the defen-

dants charged others. The question as to the first and last of these years, is said to differ from the other years ; as to 1865, because the road was run by bondholders ; and as to 1870, because it is alleged the defendants carried the lumber on which they charged less than they charged the testator under special contracts. It must also be mentioned that in 1865 and 1866 there was no by-law regulating the rates, after that there was. As to the main question on which the rule for a nonsuit is moved. The Railway Act, Consol. Stat. C. ch. 66, sec. 25, enacts : " All or any of the tolls may, by any by-law, be reduced and again raised as often as deemed necessary for the interests of the undertaking : provided that the same tolls shall be payable at the same time and under the same circumstances upon all goods and by all persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-laws relating to the tolls." This Company charged the Lindsay dealers and the testator \$1.60 in 1865 and 1866, \$1.80 in 1867, 1868, 1869, and 1870, while the Port Perry dealers were charged only \$1.35 from 1867-1870, and in 1865 and 1866 a less sum. There was therefore a substantial difference in the railway charges from and to the same place. The arrangement was, that the Port Perry shippers were charged the full amount, and upon paying it, 25c. commission was at once paid back to the shipper. This was done to evade the law, as was acknowledged in one letter. When the nonsuit was moved the suggestion was made that this action would not lie for money had and received ; that the defendants had not charged plaintiffs' testator more, but had charged the Port Perry people less than the rate. The action, however, does lie under the authorities. The introduction of railways gave them a practical monopoly in freight, and therefore the equality clause was passed. In this case it has been violated, and the testator has been forced to pay under protest. The following cases apply to the right of action for money had and received : *Atkins v. Denby*, 6 H. & N. 778 ; S. C. 7 H. & N. 934 ; *Smith v. Cuff*,

6 M. & Sel. 160 ; *Dew v. Parsons*, 2 B. & Al. 562 ; *Morgan v. Palmer*, 2 B. & C. 729 ; *Barnes v. Braithwaite et al.*, 2 H. & N. 569 ; *Fernaly v. Braston*, 20 L. T. N. S. 128 ; *Steele v. Williams*, 8 Ex. 625, 632 ; *Parker v. Great Western R. W. Co.*, 7 M. & G. 253 ; *Baxendale et al v. Great Western R. W. Co.*, 16 C. B. N. S. 137 ; *Great Western R. W. Co. v. Sutton*, L. R. 4 H. L. 226, 247, 249. The Imperial enactments corresponding to ours are 8 & 9 Vic. ch. 20, sec. 90, and 17 & 18 Vic. ch. 31, sec. 2, but their language is different from and more limited than ours. The second Act is more liberal to the Railway Companies than the Canadian Statute. Here it is argued for the defendants that because there is no charge in excess of the rate fixed by by-law, there can be no action. That would render the Act nugatory. If this section does not apply because the Company took less from the Port Perry dealers than the amount fixed by by-law, they may because the by-law fixes \$1.90 take any rate. As well might it be contended that if the Directors had fixed the rate, (as they might under the authority of a by-law empowering them: sec. 20), that section 25 as to equalizing the rate did not apply in that case either. The railway must lay down a general rule of which all persons may avail themselves : *Attorney General v. Ontario Huron and Simcoe Railway Co.*, 6 Grant 446. The true construction of the Statute is, that all the tolls shall be equal, and the Company has no right to take less than the rate fixed. The contention of defendants would be right if the statute gave them power to fix a maximum rate. In 1865 and 1866 defendants had strictly no right to take any tolls, for the rate was to be fixed by "by-law," and there was none.

Another argument urged upon the motion for the rule *nisi* was, that the Port Perry people were under different circumstances from the rest of the public ; that their traffic would go to Whitby unless a deduction had been made. But the Company did not contract to carry to Port Hope at one rate. They contracted from Port Perry to Lindsay at a certain rate, and when they got to Lindsay they must

be taken as contracting to send the Port Perry lumber to Port Hope at a lower rate. No question can be raised as to transport from Port Perry; it is solely as to Lindsay and Port Hope that the plaintiffs complain. The following are cases under the Imperial Act 17 & 18 Vic. ch. 31: *Re Ransome et al. v. Eastern Counties R. W. Co.*, 1 C. B. N. S. 437; S. C. 4 C. B. N. S. 135, 159; *Great Western R. W. Co. v. Sutton*, L. R. 4 H. L. 226. In the latter case Willes, J., at p. 247, says: "Things are of a 'like description' when, although their composition and structure are not 'identical,' which would be expressed by 'the same description,' not 'like description,' they are similar in those qualities which affect the risk and expense of carriage; and they are conveyed under like circumstances, where the route, risk, and expense are in the opinion of a jury the same." See, also, *Harris et al. v. Cockermouth and Workington R. W. Co.*, 3 C. B. N. S. 693, 713, per Williams, J.; *Nicholson et al. v. G. W. R. W. Co.*, 5 C. B. N. S. 366, as explained by *Garton v. Bristol and Exeter R. W. Co.*, 6 C. B. N. S. 639, 656; *McDougall et al. v. Covert et al.*, 18 C. P. 119. The testator was entitled to the material advantages of his residence, and the defendants have deprived him of them by approximating Port Perry to Lindsay. The Company is called upon, when a clear case of different price is shewn, to make out as clearly the special circumstances which justify it. The evidence does not shew that the Port Perry people are not better off for the difference; in fact they are better off. The difference is *prima facie* evidence that the charges are excessive. If it is to the interest of the Company to carry Port Perry lumber, let the charges on the Lindsay lumber be lowered, not so as to deprive the Company of their profit, but so as to give us our natural advantages.

As to the year 1865, the evidence of Gray shewed that the bond-holders were running the road, but they could not run it except in the name of and as the Company, and the Company alone are responsible in this action: *Bennett v. Covert*, 24 U. C. R. 38. In 1870 the excess charged to the

testator was 30c. instead of 15c., the difference being caused by the special contracts with Port Perry dealers. We claim the whole excess, but if the special contracts exempt the defendants, we claim at all events the 15c. The special contracts made by defendants were not justified. The letter of the superintendent, of January, 1870, and the contracts put in, shew that the plaintiffs' testator was not offered the same terms as the Port Perry dealers. The latter contracts were for four, six, eight, and ten years. The testator was only offered a ten-year contract. The only point of difference is the fixing a term of years, and in order that this should justify the Company, the special contract should be fixed by by-law, and open to a general class.

At the trial the point was raised, that an action on the case might lie, but not for money had and received; but there is nothing in this objection, Willes, J., says, in *Great Western R. W. Co. v. Sutton*, L. R. 4 H. L. at p. 249: "As to the formal objections, since the Common Law Procedure Act at least, I think the form of action is out of the question."

It is desirable to look at the words of the English Statutes, and the cases decided on them. The result shews, that a statute like that under discussion is to be construed in favor of the public and against the Railway Company: *Parker v. Great Western R. W. Co.*, 7 M. & G. 253. The Consol. Stat. C. ch. 66, contemplates only one mode of levying tolls. It assumes that the Company will fix them legally and by by-law, and Companies will not be allowed to say, "We will not make a by-law, so that we may take undue advantage." The words in section 25 of the Act, "so that no undue advantage," &c., are equivalent "to the intent that no undue advantage," &c.

The lumber when at Lindsay station, whether of the Port Perry or Lindsay dealers, was on the same footing, yet a difference in favor of the former was made on the carriage to Port Hope, and avowedly to evade the law. The contracts insured no advantage to the Company, for the manufacturer was not bound to make any lumber for the Port Hope market. It must be assumed that the

special rate was a fair remuneration, and therefore the excess charged to the testator was unreasonable. 27-28 Vic. ch. 86, provides for the reorganization of defendants' railway.

C. S. Patterson, Q. C., and John R. Cartwright, contra. The first point in dispute is the right to maintain this action at all under our law. Sections 20-29, both inclusive, represent section 14 of 14 & 15 Vic. ch. 51, and it is material to observe this, because the proviso which is attached in the Consolidated Statutes to section 25 would therefore appear to be applicable to all the sections representing section 14 of the original Act. The provision as to by-laws is not in the English Acts.

In the case of *Attorney-General v. Ontario, Simcoe, and Huron Ry. Co.*, 6 Grant 446, referred to by the plaintiffs, a lower rate was charged than the by-law fixed. It is not disputed that when a person has a right to the service paid for he can recover any excess exacted as money had and received; and if the defendants have compelled the testator to pay a larger amount for that which he had a right to claim for less, he can recover the excess. The plaintiffs are then in this position. They say, if we had taken the lower price we could be restrained, and yet they say, we should have taken the lower price from the testator. [WILSON, J.—Suppose a rate, say five shillings, for a certain carriage was fixed by law, and the company agreed to take three shillings from every body, could any one object?] Yes, the bondholders or the Attorney-General. The right to maintain the action for money had and received is not well settled even in England: *Parker v. Great Western R. W. Co.*, 7 M. & G. 253; *Baxendale v. Great Western R. W. Co.*, 14 C. B. N. S. 1, judgment of Erle, C. J., 21-44, S. C., 16 C. B. N. S. 137; and *Garton et al. v. Bristol and Exeter R. W. Co.*, 1 B. & S. 112. (Head-note 7.)

If the charge is not unreasonable in itself, there can be no action for money had and received. [MORRISON, J.—I considered that the strongest point when the rule *nisi* was moved, as the by-law must be presumed to be reasonable.]

The case of *Sutton v. Great Western R. W.*, 3 H. & C. 800, is no authority against *Garton v. Bristol and Exeter R. W. Co.*, 1 B. & S. 112. As to what was said in the House of Lords in *Sutton v. Great Western R. W.*, L. R. 4 H. L., on the point, the remarks there were but *dicta*, the point not having been raised below. What was said there, however, at pp. 262, 263, shews that an action would not lie in Ontario, though it may lie in England. The plaintiff cannot say that he was overcharged if he was not charged beyond the maximum rate, though others were charged lower. There is no provision in our Act that all are to be charged equally; there is only a provision, that no provision by by-law shall discriminate between shippers. At common law, carriers were not bound to carry for all alike: *Baxendale et al. v. Great Western R. W.*, 4 C. B. N. S. 78, per Byles, J.; *Branley v. South Eastern R. W.*, 12 C. B. N. S. 63. The complaint of the testator never was of undue advantage; but if he made any complaint, it was, "You have charged others less, charge me less also." Assuming that an action will lie in the present form, it is submitted that not only are the circumstances which would support it not shewn to exist, but they are disproved. No case is made out. The onus is on the plaintiffs to shew the undue advantage. It is not shewn the lumber was for the American market. If there was no evidence that it was to go beyond Port Hope or Whitby, it was no advantage to carry it to Port Hope, but a disadvantage if it had to be taken on to Whitby. The price paid by the old method to get it to Whitby was the same as charged under the arrangement with defendants to get it to Port Hope, and two extra handlings were required. It could not be contended that if the lumber were for the American market, it was in any better position at Port Hope than at Whitby. There was no "undue advantage," which means giving an unfair rate to persons in competition. The plaintiffs contend that the transit from Port Perry to Lindsay was one transaction, and that from Lindsay to Port Hope, another; but they are one. On the question of "undue advantage," see *Re Ransome et al. v.*

Eastern Counties R. W. Co., 4 C. B. N. S. 135-155; *Nicholson et al. Great Western R. W. Co.*, 5 C. B. N. S. 366; *Harris et al. v. Cockermouth and Workington R. W. Co.*, 3 C. B. N. S. 693; *Re Palmer v. London, Brighton and South Coast R. Co.*, L. R. 6 C. P. 194; *Re Parkinson v. Great Western R. W. Co.*, L. R. 6 C. P. 554, 562; *Garton v. Bristol and Exeter R. W.*, 1 B. & S. 112; *Parker v. Great Western R. W.*, 6 E. & B. 77.

There is an important difference between our Act and the English Acts. Ours is drawn more in favor of the railways, as is fitting, having regard to the business condition of the two countries respectively. The Canadian Statute was passed after the decision in *Parker v. Great Western R. W. Co.*, 6 E. & B. 77, and our Legislature must be taken to have been aware of that decision and to have framed the Railway Act having regard to that case. "Like circumstances" are equivalent to "equal carriage:" *Re Ransome et al. v. Eastern Counties R. W. Co.*, 1 C. B. N. S. 437. There may be a preference not undue: *Nicholson et al. v. Great Western R. W. Co.*, 5 C. B. N. S. 366. The plaintiffs contend that the testator had an abstract right to be charged the lowest rate paid by any lumberer who shipped from the same point on the railway at the same time, without regard to any special circumstances. This is not the law even in England, and the plaintiffs' argument, if it prevail, would oblige the Court to carry the law of this country farther than the English Courts have ever carried their more stringent enactments. The contracts of 1870 were not made for four, five, six, and ten years, but for ten years, and as much longer as the parties should manufacture at their mills. The testator was offered to be put on the same terms.

MORRISON, J., delivered the judgment of the Court.

After a careful consideration of the evidence given on the trial of this case, and the Statutes bearing on the subjects, we are of opinion that the defendants are entitled to our judgment.

The numerous English cases to which we were referred on the argument are, we think, quite distinguishable from the one before us, both with reference to the Statutes upon which these decisions were based, and the respective circumstances attending the various cases.

We find, however, in some of these cases the learned Judges using language which bears on the questions we have been considering, and so far they assist us in arriving at a determination.

These defendants by their Act of Incorporation, 10 Vic. ch. 109, sec. 15, were authorized "from time to time to fix and regulate the tolls, and charges to be received for transportation of all goods, * * and it shall and may be lawful for them to ask, demand, receive, recover, and take the said tolls, dues, or charges, to and for their own proper use and benefit, and also that they shall have full power to regulate the time and manner in which goods and passengers shall be transported, taken and carried, * * as well as the manner of collecting all tolls and dues on account of transportation and carriage."

This section is still in force and unrepealed.

By the amending Act, 16 Vic. ch. 241, sec. 3, certain sections of the then Railway Clauses Consolidation Act are incorporated with the defendants' Act of incorporation. Among them the sub-secs. *Firstly* and *Secondly* of sec. 14, respecting tolls. The provisions of these sub-secs. form sections 20 to 25 inclusive of Con. Stat. C. ch. 66. So that, in considering the duty of the defendants respecting tolls, we have to examine the provisions in the original Act incorporating the company and the Railway Clauses Act.

We find also that by the 10th section of the amending Act, 16 Vic., it is enacted "that it shall be lawful for the directors of the said company to make and carry into effect any arrangements which they shall deem meet, with any other railway company or steamboat company, respecting carriage of freight or passengers, or the working of their railway and the other such railway, or otherwise, or respecting the tolls to be charged for the carriage of freight or passengers thereon."

And by the 151st section of *The Railway Act*, "The by-laws of every railroad company regulating the tolls to be taken on such road, in the special Act respecting which a provision has been inserted that such railroad should be subject to the provisions of any general Act relating to railroads, shall be subject to the approval of the Governor in Council, and no by-law of any railroad or railway in this Province by which any tolls are to be imposed or altered * * * shall have any force or effect until the same has been approved and sanctioned by the Governor in Council."

It appears that on the 11th of May, 1867, a by-law was sanctioned by the Governor in Council, and by it the tolls on lumber was fixed at \$1.90 per M. feet for its carriage from Lindsay to Port Hope: that previous to that date there was no by-law regulating the tolls to be charged; and that during the years 1865 and 1866, the testator paid \$1.60 per M. feet for the carriage of his lumber between those points: that during those years a general arrangement was made with the Port Perry dealers, by which the defendants charged them \$2 per M. feet from Port Perry (viâ Lindsay) to Port Hope, the defendants paying the steamboat charges to Lindsay, and the Harbour dues at Port Hope; the Port Perry people loading at Port Perry, unloading and reloading at Lindsay, and unloading again at Port Hope.

It seems to me that the defendants had a perfect right to make such a general arrangement to secure such freight.

It may be true, looking at the detailed estimate of expenses to the company as made by one of the witnesses, that by such an arrangement, deducting the cost of transportation by water and the harbour dues at Port Hope, the company only realized \$1.35 for the services of their railway from Lindsay to Port Hope.

That may be so, and as shewing a result is a mere matter of profit and loss to the defendants; and assuming that in the absence of any by-law the provisions of the 25th section of the *Railway Act* apply, I am at a loss to see how such an arrangement, *per se*, affords an undue advantage to the

Port Perry dealers, or gives them a preference over the testator, or that it worked to his detriment, or interfered with his business.

We see nothing to prevent the company undertaking to forward lumber from Port Perry to Port Hope, or to Rochester, at any general rate they may fix, provided it applies equally to all persons sending lumber between the same points.

As there was no by-law during these two years fixing any rate or tolls, I am inclined to think that the company would only be entitled as common carriers during those years, to receive a fair and reasonable compensation for any services they might perform.

Their omitting to pass a by-law and having it sanctioned by the Governor in Council disabled them from levying or enforcing any claim for tolls.

Mr. Justice Blackburn, in the *Great Western R. W. Co. v. Sutton*, L. R. 4 H. L. at p. 237, lays down clearly the obligations which the Common Law imposed upon the common carrier. He says, "At Common Law a person holding himself out as a carrier of goods is not under any obligation to treat all customers equally. The obligation which the Common Law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so), on being paid a *reasonable* compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to shew that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the Common Law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or even

gratis. All that the law required was, that he should not charge any more than was reasonable."

Then as to the years 1867, 1868, and 1869. During these years the testator paid to the defendants for carrying his lumber from Lindsay to Port Hope, in 1867, the by-law rate, \$1.90 per M., and in 1868 and 1869 \$1.80, being ten cents lower than the tariff; while during these years, in order to induce the Port Perry dealers to continue sending their lumber for shipment viâ Lindsay and Port Hope, the defendants offered and allowed to the shipping agent of the Port Perry people a commission, or rather a rebatement, of 25 cts., per M. on all lumber coming from Port Perry, the parties first paying to the company the tariff rate of \$1.90, and the company repaying the 25 cts. to the agent, leaving \$1.65 net to the defendants; in other words, the company paying the Port Perry dealers 25 cts. per M. towards the expenses of its transportation by water; and this arrangement it appears was made solely for the purpose of inducing those lumber dealers to send their lumber to market viâ the defendants' railroad from Lindsay, a traffic which it is sworn would, were it not for such an arrangement, have been carried in waggons to Whitby, and the defendants been deprived of the benefit of the trade.

There was no by-law authorizing such a rate of toll in such a case. The amount was suggested by a letter from the defendants' superintendent, and it was a rate or arrangement that all shippers at Port Perry could avail themselves of.

It would, I take it, be quite competent for the defendants to have passed a by-law for the sanction of the Governor, fixing a toll of \$1.65 (the net amount received by the defendants) on all lumber shipped from Port Perry to be forwarded viâ Lindsay to Port Hope.

Such a by-law would not, I think, be within the meaning of the proviso of the 25th section; and such an arrangement as the managers of these defendants did make, seems to me cannot necessarily be termed an undue advantage or privilege as against the testator; nor can I see in what way it

placed him at a disadvantage, or was detrimental to his interests, or interfered with his business, or worked any prejudice to him.

No evidence was adduced or given to shew that the arrangement in question so affected him.

The fact that the 25th section uses the word "undue" implies, and as the Legislature must have supposed, that some parties might have advantages over others. Many might be suggested.

If the Railway Act had used the like language and restrictions as appear in the 3rd section of the Act incorporating the Ontario, Simcoe, and Huron R. R., which is set out in full in the judgment of the learned Chancellor (Blake) in the *Attorney-General v. Ontario, Simcoe, and Huron R. W. Co.*, 6 Grant at p. 448, little doubt could exist as to the intention of the Legislature.

The language there used is much stronger and more explicit against the company than the language used in the 25th section of the Railway Act.

The learned Chancellor in reference to it said, "It is clear, I apprehend, that the company are not bound to establish a uniform rate upon every portion of the road, and there is room to argue that the interests of the company are to be taken into consideration, in determining whether there is that difference of circumstances which would authorize a different rate of charge under the Act."

And again—after quoting the following words from the section: "And no reduction or advance in any such tolls shall be made directly or indirectly in favor of or against any particular company, person or party travelling upon or using the road,"—the learned Chancellor proceeds: "It is not contended that this provision necessitates a uniform rate of charge. Different rates may be charged even upon the same portion of the road under different circumstances."

That was an injunction case, to restrain the company from carrying out a contract which the Court declared a violation of the Statute, as the tariff in that case was reduced in favor of one firm, not upon any principle applicable to the public generally, but in virtue of a contract.

In re Baxendale and The Great Western R. W. Co., 5 C. B. N. S. at p. 353, Cockburn, C. J., in giving judgment says, "Greater difficulty and nicety perhaps arises in dealing with cases in which the purpose and effect of the thing complained of is, the benefit of the company in their character of proprietors of the particular railway. In these cases, the Court might feel greater reluctance to interpose, partly from an unwillingness to interfere with parties in the management of their own affairs for their own advantage, partly from a disposition to give companies credit for acting on an enlightened view of their own interests as identified with those of the public; yet, if the Court became clearly satisfied that a company was seeking to promote its own advantage by establishing an inequality which was unreasonable under the circumstances, and operated unfairly and injuriously upon particular individuals, or that it was affording to one person or set of persons an advantage which it would not afford to another under similar circumstances, this Court would not hesitate to interfere to prevent such a result, although by so doing they might prevent the company from securing all the profit that it might otherwise derive from the use of its property * * So, again, if an arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favourable terms than those bringing a less quantity, although the Court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantage were extended to all persons under the like circumstances, yet it would assuredly insist on the latter condition, and would interfere in the case of any special agreement by which the company had secured to a particular individual the benefit of such an agreement, to the exclusion of others, or even where an attempt had been made, by keeping the agreement secret, to make it operate unduly to the prejudice of third parties."

And in *Garton v. Bristol & Exeter R. W. Co.*, 6 C. B. N. S. at p. 652, the same learned Chief Justice says: "Nor is it

necessary to say, whether, with a view to meet competition by another railway company or by another mode of carriage, the company may not say to persons having large quantities of heavy goods to send, 'If you will engage to send a given quantity, or to send all the goods you have to send, by our line, we will give you such an advantage.' If that be done *bonâ fide*, with a view to overcome opposition, and the public in general are offered the same advantages under like conditions, it is unnecessary to say whether that might not be allowable; though I wish to guard myself against deciding that upon the present occasion."

And Williams, J., in the same case says, at p. 654, "If it had appeared that a lower rate had been charged to certain individuals for the purpose of meeting competition by a canal or another railway, or in consideration of their sending large quantities of goods, though the same advantages were not publicly and generally held out, it may be that the company would be warranted in so doing. * * If such had been the history of the reduced charge, or if, with a view to meet such competition, the company were to say to certain persons, 'We will carry for you at a reduced rate, provided you will undertake to send your goods exclusively by our railway, and not to resort to water carriage, or any other mode of conveyance,' the matter might have been well deserving of full consideration."

I refer also to *In re Harris v. Cockermouth and Workington Railway Co.*, 3 C. B. N. S. 693, more particularly to what Cockburn, C. J., says in giving judgment, at p. 711, "The Court has already intimated, if not absolutely decided, (*Ransome's Case*, 1 C. B. N. S. 437; *Oxlade's Case*, 1 C. B. N. S. 454,) that a Railway Company is entitled, in determining the rate of tolls they will impose upon any particular traffic, to take into consideration any circumstances either of a general or a local character which may enable them to charge less in some cases than in others."

I refer also to what was said by Mr. Baron Bramwell, in the case in the House of Lords, already cited: *The Great*

Western R. W. Co. v. Sutton, L. R. 4 H. L. at p. 252. The learned Baron, after referring to the English acts, says, "It seems to me impossible to read these clauses without seeing that they were designed to prevent an attempt at monopoly in the company (which is not here the question, and of which there is no evidence), and a preference of one or more, or a distinction to the prejudice of one or more. The words, 'and no reduction, &c., shall be made either in favor of or against any particular company or person', seem to suppose that there may be a difference, if it is not in favor of or against any particular person; as, for instance, that goods brought from town A. might be charged less than the same description from town B. Suppose town B. had water conveyance, and town A. had not, or suppose that town B. were much nearer another railway than town A., might not a difference be made, even though both towns used the same station. It seems to me that such differences could be made. It would not be a breach of the equality clause. See *Nicholson v. The Great Western R. W. Co.*, 5 C. B. N. S. 366. *Ransome v. The Great Eastern R. W. Co.*, 4 C. B. N. S. 135, 150. It seems to me, therefore, that 'under the like circumstances,' or some similar expression, is necessarily found in the first part of the equality clause. At all events, there are the words, 'same or like description and quantity,' and any difference is enough to prevent a breach of the proviso against partiality, or favor of or against any particular person."

In the case of *Nicholson v. The Great Western R. W. Co.*, 5 C. B. N. S. 366, referred to by Mr. Baron Bramwell, Crowder, J., who delivered the judgment, said, at p. 436, "We think it sufficiently appears that the Great Western Railway Company, in entering into this agreement, had only the interests of the proprietors in view, and the legitimate increase of the profits of the railway. It has been said by the Court, in the case of *In re Ransome*, 1 C. B. N. S. 452, 'that in considering the question of undue preference, the fair interests of the railway ought to be taken into account.' In that case, the decision was against the railway company,

only because it appeared to be the manifest object of the Railway Company, in charging different rates, to enable one set of coal owners to compete with another set." He further said, at p. 437, "When the statute speaks of 'undue and unreasonable preference or advantage,' or 'undue or unreasonable prejudice, or disadvantage,' it uses language implying that there may be advantage to one person or one class of traffic, and prejudice to another, which would not be within the Act of Parliament. The preference and prejudice must be 'undue' or 'unreasonable' to be within the statute; and, although, in the case now before the Court, it is quite manifest that the Ruabon Coal Company have many and important advantages in carrying their coal on the Great Western Railway, as against the complainants and other coal owners in the Forest of Dean, still the question remains, are they 'undue' or 'unreasonable' advantages."

All these quotations from the judgments of these eminent Judges, go to shew that the traffic arrangement so made by the managers of this railway, to induce traffic from Port Perry to pass over their line viâ Lindsay to Port Hope, ought not, *per se*, to be treated or characterized as a prohibited arrangement within the meaning and intention of the 25th section of the Railway Act, as affording an undue advantage or privilege to the Port Perry dealers, as against the plaintiffs' testator.

I may further remark that it is clear that the company, by the 10th section of the amending Act, 16 Vic. ch. 241, which I have already quoted, were empowered and authorized (doubtless to facilitate and induce traffic over their line) to enter into arrangements with steamboat proprietors, so as to enable the defendants to make a charge or a general through rate from any point, say Port Perry on Lake Scugog, to Port Hope viâ Lindsay, or to Oswego or Rochester, or other ports on Lake Ontario; and that what the defendants did, and what is now complained of, was practically the same thing.

Then as to the traffic arrangements and contracts en-

tered into by the defendants in the year 1870. Whatever difficulty there might appear to be in the way of arriving at a satisfactory conclusion as to the previous years, I see no difficulty, so far as these plaintiffs are concerned, for that year.

Whether the contracts entered into by the defendants are contracts they were authorized by their acts of incorporation to make, is beside the question before us.

So far as the testator was concerned, I fail to see any reason why he should have complained. The terms offered by the company were general and open to all persons, and were in fact offered to the testator. It seems to me there was no undue advantage or preference given to any one. None was suggested.

It may be that the lumber business of the testator was of a kind that he could not avail himself of the terms so offered to all by the company.

These terms were open to the public generally, applying to all lumber sent over the line from a particular point to a particular point.

For all that appears, we may fairly assume that the stipulations in these contracts that the lumber was to be loaded at the wharf at Lindsay, and delivered at the wharf at Port Hope for shipment, was so material to the company, and would be so different from the usual and ordinary mode of receiving lumber at their station grounds and line at Lindsay, and the unloading it again at the wharf at the harbour of Port Hope, and not at their usual station grounds there, that in point of expense, trouble and convenience to the company in operating their line of railway, these exceptional features of this traffic authorized and well justified the managers of the railway, in the interests of the undertaking, in reducing the charges to the extent they did upon lumber so shipped and delivered.

I may generally remark on the whole case as made by the plaintiffs at the trial, that no evidence was adduced to establish specifically that the traffic arrangements complained of during the years in question did in point of

fact operate in any way to the disadvantage or detriment of the business of the testator ; or that the defendants, by the rate they charged the Port Perry dealers, enabled them to enter into competition with him at Port Hope or elsewhere.

It seems to me, that, in order to enable the plaintiffs to recover, they were bound to give more testimony than merely shewing that their testator paid a charge, which the defendants were entitled by their sanctioned by-law to exact, and that the other parties paid a less sum. The question is, whether an undue advantage was afforded to these latter parties, contrary to the meaning and spirit of the 25th section of the Railway Act, read in connection with the Acts relating to the company.

And some evidence, I think, was necessary to shew that the circumstances under which these different charges were made were not dissimilar, and that by reason of the difference the testator was prejudiced and placed at a disadvantage ; and so not leave the question of an undue advantage being afforded to others to mere inference or conjecture.

Deciding as we do the main points against the plaintiffs, it becomes unnecessary to consider the other questions raised.

The rule will be absolute to enter a nonsuit.

Rule absolute.

SHANLY V. MIDLAND RAILWAY OF CANADA.

Railway contract—Pleading—Performance of conditions precedent—C. L. P. Act, sec. 87.

Declaration on a deed, set out in it, by which plaintiff was to do all the work on an extension of defendants' railway. By the 17th clause of the deed defendants covenanted to provide all the rails required for the extension and works connected therewith, and further, when required by plaintiff, to supply him with engines, &c., for the purpose of ballasting, &c. By the 19th clause defendants agreed to pay the plaintiff for the work and materials the scheduled prices by monthly payments in certain proportions specified, and within a time named after the giving of a certificate by defendants' engineer. Clause 20 provided that the plaintiff would accept, during the first five months, defendants' notes at three months in payment, defendants agreeing to place at the order of the plaintiff, till the notes were paid by them, defendants' bonds to the value of said notes, such bonds being estimated at 85 per cent. of their face value, and after the first five months defendants agreed to pay cash. Clause 22 declared time to be of the essence of the contract. The declaration averred that "the plaintiff did all things necessary on his part to entitle him to have the said contract performed by defendants, and the time for so doing has elapsed." The breaches assigned were, that the plaintiff duly performed work in accordance with the contract to the amount of \$204,000, and received \$154,000, but that defendants had not paid the balance. 2. That the plaintiff did large quantities of rock excavation and extra work, and was entitled to \$50,000 therefor, which defendants had not paid. 3. That defendants did not during the first five months "deliver to the plaintiff" their bonds to the value of the notes, &c. 4. That defendants did not provide iron rails, &c.

Twelfth plea, as to \$15,000 parcel, &c., that before action, at the plaintiff's request, defendants delivered to plaintiff their acceptance of his bill of exchange for said sum, which bill was current at the commencement of this suit, and was afterwards paid.

Held, on demurrer, plea good, following *Henry et al. v. Earl*, 8 M. & W. 228, and *Horner v. Denham*, 12 Q. B. 813, note.

Held, also, that the general allegation in the declaration, that the plaintiff did all things necessary on his part to entitle him to have the contract performed, &c., would only cover acts to be done by the plaintiff, and therefore sufficiently averred the request by the plaintiff to provide the engines, &c., but not that the engineer had granted the certificates; but that this defect was covered by defendants pleading over.

Held, also, that the third breach, that defendants did not deliver said bonds to the plaintiff, was bad, for defendants' covenant was to place said bonds at the order of plaintiff, which was capable of a different meaning.

DEMURRER. Declaration, that by deed dated 2nd January, 1872, between plaintiff and defendants, the plaintiff agreed to do all the work on an extension of defendants' line.

The deed was set out in full, but the following clauses only seem material :—

17. That the said defendants would provide the iron rails for the track, and spikes for fastening the same, the lands required for the line of the extension, (commonly called the right of way) for the stations, for ballast pits, and roads thereto, together with such iron rails as might be necessary to form a track or tracks to such pits, and would further, when required by the plaintiff so to do, supply him with the engines, together with engine drivers and stokers therefor, and fifty platform cars, for the purpose of track laying and ballasting; but the said plaintiff should supply wood and water for the said engines, and all other things necessary for the proper working of them, and of the said cars, the said defendants however agreeing on their part to keep them in repair.

19. And the said defendants, in consideration of the premises, covenanted with the said plaintiff, his executors or administrators, that the said defendants would pay to him or them, for and in respect of the works in the said specifications, plans, drawings, and schedules mentioned, and thereby contracted for, and the materials and articles to be provided and used in the execution and performance of such work, the several prices or sums set out in the schedules thereto annexed, by monthly payments, and in the proportions following, that is to say : within fourteen days after a certificate should be signed and executed by the engineer of the said defendants, as mentioned in the specifications annexed—who should, not later than six days after the end of every month, unless unavoidably prevented, give such certificate to the said plaintiff—the said defendants would pay to the said plaintiff, his executors or administrators, the amount in such certificate mentioned as being due to the said plaintiff, after making proper allowance on all deductions or additions as aforesaid, less ten per cent. thereof reserved until the completion of the work, and would pay the balance which might remain due to the said plaintiff, his executors or administrators, on completion of

the said works within one calendar month next after the engineer of the said defendants in charge should have certified in writing under his hand that the same were completed in accordance with the said contract to his satisfaction, and should also have certified what balance was due under the said contract to the said plaintiff; and, after making all proper charges against the said plaintiff and the said defendants, in like manner upon like certificate, pay the said plaintiff for any such extras as aforesaid the prices or sums in that behalf thereinbefore provided, to be approved as aforesaid; provided always, that in no case should the amount paid to the said plaintiff, exclusive of extras, exceed in all the sum of \$6,200 per mile.

20. And it was thereby agreed by the said plaintiff for himself, his executors and administrators, that he and they would accept payment of such sums as might be due on the monthly estimates provided for during the first four months in the notes of the said defendants, such notes to be payable three months after date, the said defendants agreeing on their part to place at the order of the said plaintiff, until the said notes were paid by them, bonds of the said defendants equal to the value of such notes so given to the plaintiff, such bonds being estimated at eighty-five per cent. of their face value; and after the said first four months the said defendants agreed to make the said monthly payments in cash.

22. And it was thereby lastly agreed by and between the parties thereto, that time should be of the essence of the said contract.

And the plaintiff did all things necessary on his part to entitle him to have the said contract performed by the said defendants, and the time for so doing has elapsed. Nevertheless for a breach of the covenants in the said deed, the plaintiff says that he duly performed work under the said deed, and in accordance with the provisions thereof, to the amount of \$204,000; and although the defendants have paid him the sum of \$154,000, part thereof: Yet they have not paid the balance thereof, and the said

balance or sum of \$50,000 was before the commencement of this suit, and is still due and unpaid.

And for a further breach of the covenants in the said deed the plaintiff says that he did large quantities of rock excavation and extra work under the said deed, and became entitled to a large sum of money from the defendants therefor, to wit, \$50,000, before the commencement of this suit; yet the defendants have not paid the same.

And for a further breach of the covenants in the said deed the plaintiff says, that the defendants did not deliver to the plaintiff bonds of the defendants equal to the value of the promissory notes given by them to the plaintiff during the first four months of the execution of the said works under the said covenant, estimated at 85 per cent. of their face value, nor any bonds whatever.

And for a further breach of the covenants in the said deed, the plaintiff says that the defendants did not provide the iron rails for the track, and spikes for the fastening the same, nor the land required for the line of the extension, (commonly called the right of way), for stations, for ballast pits and roads thereto, nor the iron rails as might be necessary to form a track or tracks to such pits, and did not supply him with three engines, engine drivers and stokers therefor, and also did not supply him with fifty platform cars for the purpose of track laying and ballasting, nor did keep the same in repair as set out in the said deed.

Common counts were added.

The third plea was demurred to, but is not set out, as the defendants admitted they could not support it.

Twelfth plea, as to \$15,000, parcel of the money claimed in the said declaration, that before action, at the request of the plaintiff, the defendants delivered to the plaintiff their acceptance of his bill of exchange for the sum of \$15,000, parcel of the said moneys, which said bill was current at the time of the commencement of this suit, and was afterwards duly paid and satisfied by the defendants.

The plaintiff demurred to the 12th plea, on the ground that it admitted plaintiff's cause of action as to the sum

mentioned in the plea, and gave no sufficient answer thereto.

The defendants joined in demurrer, and excepted to the declaration, on the grounds :

That neither the first nor second breach alleges that the engineer's certificate was obtained, which under the contract was a condition precedent to the plaintiff's right to be paid ; nor if a certificate was obtained is it shewn that a sufficient time had elapsed after the signing of such certificate to entitle the plaintiff to payment.

That the third breach is not applicable to any covenant of the defendants, there being no covenant to deliver bonds to the plaintiff.

That the fourth breach does not shew that the defendants were required by the plaintiff to supply him with the engines, engine drivers and stokers, and platform cars in that breach mentioned.

In this term the demurrer was argued. *J. H. Cameron*, Q. C., for the plaintiff. The allegation, after the 22nd condition, that the plaintiff did all things to entitle him to have the contract performed, and the time for doing so had elapsed, is an answer to the exceptions to the first and second breaches. It was not necessary to aver a more specific right to sue, either as to the certificate or as to the lapse of a sufficient time.

The third breach is sufficiently alleged, and there is a covenant in effect to deliver the bonds to plaintiff.

The fourth breach is also sufficient, for the general allegation answers instead of a more precise averment, that the plaintiff required the engines, &c., and that the defendants refused to furnish them.

The twelfth plea is bad, for it does not answer the damages in respect of the \$15,000.

Patterson, Q. C., contra. The twelfth plea need not answer the damages. *Henry et al. v. Earl*, 8 M. & W. 228, and *Horner v. Denham*, 12 Q. B. 813, note, are expressly in point.

As to the exception to the first and second breaches. The express averment that the plaintiff has obtained the engineer's certificate cannot be dispensed with. The general allegation is not sufficient. Besides, the allegation is not that all things had happened to entitle the plaintiff to maintain an action, but to have the contract performed by the defendants. The same objection applies to the allegation of time.

As to the exception to the third breach, there is no covenant by the defendants to deliver bonds to the plaintiff, but to place them at the order of the plaintiff until the notes are paid by the defendants. The two things are quite different.

As to the exception to the fourth breach, the defendants were to find engines, &c., only when they were required to do so by plaintiff. And there should have been an express averment, that the plaintiff did require of the defendants to furnish the engines and do the other acts provided for in the 17th condition, and that they neglected and refused to do so. The general averment that the plaintiff had done all things to entitle him to have the covenant performed by the defendants, is not sufficient; nor is it the same as saying that the plaintiff, by reason of the general averment of performance, is entitled to maintain an action.

WILSON, J., delivered the judgment of the Court.

The cases referred to shew the twelfth plea is well pleaded.

As to the exception to the third breach, we think that the agreement of the defendants to place at the order of the plaintiff, until the notes in question were paid by them, the bonds in the twentieth article of the contract mentioned, is not a covenant to deliver the bonds to the plaintiff. Delivering the bonds to the plaintiff would be a sufficient placing them at his order, but they might also be placed at his order without a delivery of them to the plaintiff. The defendants might have deposited them in a bank, and given notice to the plaintiff that they were so deposited, subject to his order.

It is safer that the parties should follow the language of the contract, when there is any reason to infer that the words may bear more than one signification, or when a performance may be satisfied by more than one act, or in more ways than one.

The parties may, no doubt, rely on the legal effect of a contract, and may plead that instead of the precise words of engagement. That is what has been done here; but I think the plaintiff's construction of this covenant is not the only way in which it could have been performed.

The exceptions to the first, second, and fourth breaches are of the like nature: that as to the first and second breaches, a certificate from the engineer was not shewn to have been obtained by the plaintiff; and as to the fourth breach, that it did not shew the plaintiff had required the defendants to furnish him with the engines, &c.

These pre-requisites are not properly averred to have been complied with or performed, by the general allegation that the plaintiff did all things, &c.

As to the first and second breaches, which are based upon the nineteenth article: the defendants are to pay the monthly payments within fourteen days after a certificate has been signed by the engineer, and the balance due at the end of the work within one month after the engineer had certified in writing that the work was completed in accordance with the contract to his satisfaction, and what the balance was that was due to the plaintiff; and in like manner, upon the like certificate, pay for any extra work at the prices specified, provided the payments, (exclusive of extras), should in no case exceed \$6,200 per mile.

The plaintiff contends the defendants are obliged to pay him because when he says he did all things necessary on his part to entitle him to have the contract performed by the defendants, and that the time for doing so had elapsed, that by that general language he has in effect said the engineer did give the necessary certificates to him, and the times for their payment had elapsed before the bringing of this suit, and so his action is well brought, and supported by all necessary averments to entitle him to a recovery.

By the averment that *the plaintiff did all things necessary on his part* to entitle him to have the contract performed, does that mean, that the engineer signed a certificate or certificates as before stated? The plaintiff could not do that. Or does it mean that *the plaintiff duly procured these certificates* from the engineer, and so the engineer did certify as required by the contract?

The averment of the plaintiff is the same as that given in the schedule of the Common Law Procedure Act. But there that shews acts to be performed by the parties personally. And the forms should have such modifications as may be necessary to meet the facts of the case: Common Law Procedure Act, sec. 87. The substance of the form if followed will be sufficient: *Ibid.*

The more usual form is, that "all conditions were performed and all things have been done and happened, and all times elapsed" to entitle the plaintiff to have and receive the benefit of the contract, or the particular thing done which was engaged to be done.

That implies that the plaintiff was ready and willing to pay for the goods on delivery: *Bentley v. Dawes et al.*, 9 Ex. 666; *Bullen & Leake*, 3rd ed., 147, 148.

In *Bamberger et al. v. Commercial Credit Mutual Assurance Society*, 15 C. B. 676, where it was argued that the sufficiency of the funds of the Company, and the adjustment of loss by the Company, were conditions precedent to be averred in the declaration, the Court held these acts were sufficiently averred by the general allegation made there, part of which was, that all things had happened to entitle them to be paid.

In that case the allegation, "that the plaintiff had done all things on his part to entitle him to payment," would certainly not have answered.

I should have been of opinion the allegation was not a sufficient averment of the engineer having granted the certificates, if the defendants had not pleaded over, but had demurred to the declaration for that cause; for the very words of the statutory form are not to be copied in every

case. The averment must be adapted to the nature and terms of the condition. And if the act has to be done by a third party, or by the defendants, the allegation, that the *plaintiff* had done everything to entitle him to sue, cannot be sufficient.

If we could look at the pleas which are on the demurrer book, but not among the pleadings excepted to, we should certainly not entertain the exceptions, because, as a fact, the defendants have traversed the giving of the certificates. We do not decide on that ground, but because the defendants have pleaded over, and the declaration may now be read as meaning that the plaintiff did procure the certificates of the engineer.

Of course the general averment of performance is sufficient as to the fourth breach, as expressing that the plaintiff did require the defendants to furnish the engines, &c., because that was an act which he personally was to do, and he expressly avers he did all things, &c.

I should think it would be advisable in every case to allege, according to the common form, that all conditions were performed, and all things happened, &c.

The judgment will be for the plaintiff on demurrer to the third plea, and for the plaintiff against the exceptions to the first, second and fourth breaches of the first count of the declaration, and for the defendants on the demurrer to the twelfth plea, and on the exception taken to the third breach of the first count.

Judgment accordingly.

WALLBRIDGE V. JONES.

Evidence—Identity—Proof of heirship.

In ejectment the plaintiff claimed under one D. L. C. whom he alleged to be eldest son and heir-at law of L. C., assignee of the grantee of the Crown. The patent from the Crown was to "Francis Weis" and the deed to L. C. was signed by "Francis Weast," as a marksman. There was no direct evidence of the identity of Weis and Weast. The deed was proved by the memorial, as secondary evidence, but it was shewn to have been in the custody of defendant, who claimed under the will of L. C., which he produced, and had been with the patent in the possession of the C. family since 1816. It was not shewn there was any other Francis Weis except the person who conveyed as Francis Weast. The only evidence of the heirship of D. L. C. was his own. He shewed a general knowledge of the affairs and members of the family, was brought up in the neighbourhood of a number of relatives, and had been informed of his heirship by his mother and his father's mother. Several uncles and other relatives were called, but no other witness was examined as to the heirship. The defendant claimed as devisee under the will of the same L. C., under whom the plaintiff claimed.

Held, that the identity of Weis and Weast who made the deed to L. C. was sufficiently proved.

Held, also, that D. L. C.'s statements, under the circumstances, sufficiently proved his heirship, and that it was not necessary to prove the marriage of his father and mother unless it was disputed.

EJECTMENT for lot 11, in the second concession of the Township of Percy, in the County of Northumberland.

The plaintiff claimed the lot as assignee of David L. Carscallen, grandson and heir-at-law of Luke Carscallen, who was the assignee of Francis Weis, the grantee of the Crown.

The defendant denied the plaintiff's title and claimed by length of possession, and as devisee under the will of her husband, George E. Jones, who derived his title from certain devisees under the will of the said Luke Carscallen.

The cause was tried at the last Spring Assizes, at Cobourg, by Wilson, J., without a jury.

It appeared at the trial that the land in question was granted, on the 3rd March, 1809, to Francis Weis, of the Township of Ameliasburgh, in the County of Prince Edward, in the Midland district, yeoman, son of John Weis, a U. E. Loyalist. An exemplification of this patent was produced.

It also appeared that on the 16th August, 1816, in consideration of £50, Francis *Weast*, of the Township of Ameliastown, in the Midland District, yeoman, conveyed the lot in question to Luke Carscallen, of the Township of Fredericksburgh, in the same District, gentleman. This deed was registered on the 21st September, 1816. It was not produced at the trial, but a memorial of it purporting to be signed by "Francis Weast," as a marksman, was proved.

The eldest son of Luke Carscallen was Edward Carscallen, who died before his father, leaving a son, David Lockwood Carscallen, whom the plaintiff alleged to be the heir-at-law of Luke Carscallen.

On the 18th October, 1860, David Lockwood Carscallen, as heir-at-law of his father and grandfather, in consideration of £50, conveyed to the plaintiff the lot in question.

The defendant proved the will of Luke Carscallen, under which the testator's four younger sons were the devisees of the land in question. This will was not registered.

Several deeds from these devisees affecting this property were proved, and in fine a deed of confirmation from all four to one Archibald Waddell, dated 25th October, 1860, and also one from Isaac Carscallen, surviving executor of Luke Carscallen, to Archibald Waddell, dated 7th September, 1859, and registered before the deed made by David Lockwood Carscallen to the plaintiff.

It was also shewn that portions of the land claimed by the plaintiff had been sold at different times for taxes. These portions amounted in the whole to 59 acres.

At the close of the case defendant's counsel contended that Luke Carscallen's will shewed title out of the plaintiff: that as to the portions sold for taxes the verdict must be for the defendant: that it was not shewn that the patentee ever conveyed the land, the name of the patentee and of the person who conveyed to Luke Carscallen being different: that it was not shewn that David Lockwood Carscallen was the heir-at-law of Edward, or that Edward

Carscallen was the heir-at-law of Luke Carscallen : that any objection as to the non-registration of the will of Luke Carscallen could not prevail, as the deed from Isaac Carscallen, executor of Luke Carscallen, was registered before the deed from David L. Carscallen to plaintiff.

The learned Judge entered a verdict for the plaintiff, for the land not sold for taxes, expressing the opinion that the non-registration of the will invalidated all titles dependent upon it ; and entered a verdict for defendant for the remainder of the land sold for taxes, being fifty-nine acres.

The evidence as to the heirship of David Lockwood Carscallen, and the identity of the grantee of the Crown and the person who conveyed to Luke Carscallen, was as follows :

David Lockwood Carscallen stated : " I am the eldest son of Edward Carscallen. He died in 1812, I believe. He was the son of Luke Carscallen, the eldest son. Luke Carscallen died a few years after my father died. I made the conveyance to plaintiff. I got the £50 consideration mentioned in it. I have no deeds and never had any in my possession relating to the land. I gave no paper to the plaintiff about this land but the deed. I knew Francis Weis. I have spoken to him. I knew his son-in-law and a number of his nephews. I knew him over thirty-five years ago in Belleville. He lived then, I believe, in Ameliasburgh. I have seen him in Percy, too. I did not know any one at that time of that name, but that Francis Weis. I understood he was a U. E. Loyalist.

Cross-examined—I have no recollection of my father. He died when I was about a year old. He had six or seven brothers : John, Isaac, James, Benjamin, Thomas, George, Archibald, Craig. My father's name was Edward. I always understood by my mother and by my father's mother that my father was the eldest son of the family. I also understood so from my uncles."

[The witness was examined at length as to his father's brothers, and their families, but nothing material to this

report was elicited.] He proceeded: "I never gave a deed of my grandfather's land but of this farm. I don't think I ever saw my grandfather's will. * * I did not know what my grandfather's will had not given away. I knew whatever he had not devised I was heir to. * * The first intimation I had I was heir-at-law was over thirty years ago, when I was sent for to join in a mortgage given by my uncle John. In 1816 there may have been others of the name of Francis Weis. Some of the family spell their name one way some another.

Craig Carscallen, a son of Luke Carscallen, said he had seen the original patent to Weis in his mother's chest, after his father's death. There were a number of old deeds with the patent. He could not say what they were. He had signed a deed of the land to Mr. Waddell.

Mr. *Kerr*, partner of the defendant's attorney, admitted having seen in Mr. Ruttan's office, on the day before the trial, a deed from Weis or Weast to Luke Carscallen, executed by Weis or Weast as a marksman. It had been in defendant's attorney's office, and he took it thence to Mr. Ruttan's office. He presumed he had it for the defendant.

Several members of the Carscallen family were called as witnesses, but none of them were interrogated as to the heirship of David Lockwood Carscallen, and no other evidence touching it was given.

During Easter Term, 1872, *J. W. Kerr* obtained a rule *nisi* to set aside the verdict and enter a verdict for defendant, or a nonsuit, upon the ground that the plaintiff failed in proving title to the land, and the land was shewn to have passed by the will of Luke Carscallen to the parties under whom defendant holds.

The rule was enlarged to Michaelmas Term, when *Hector Cameron*, Q. C., shewed cause. The evidence was sufficient to sustain the plaintiff's case, and the prior registry was entitled to prevail against the will. See *Bondy v. Fox*, 29 U. C. R. 64, where the cases are collected.

C. S. Patterson, Q. C., and J. W. Kerr, for defendant.

There was no sufficient evidence of the identity of the patentee with the grantor in the deed to Luke Carscallen, and no sufficient evidence that David Lockwood Carscallen was the heir-at-law of Luke Carscallen, and no evidence of the marriage of the father and mother. [RICHARDS, C. J., it is not necessary to prove the marriage unless it has been attacked. When David Lockwood Carscallen says he is the son, it is to be presumed he means the legitimate son of Edward Carscallen.] The name mentioned in the deed to Carscallen is not that contained in the patent. In the latter it is Weis, whilst in the deed it is Weast. The names are not the same; 'if they were, that would be some evidence of the identity: *Brown v. Livingstone*, 29 U. C. R. 520; *Sewell v. Evans*, *Roden v. Ryde*, 4 Q. B. 626.

The party under whom plaintiff claims is the only witness who proves he was the heir-at-law of Luke Carscallen. His name is not mentioned in Luke's will, and the presumption would be that he was not his heir-at-law. There should have been more evidence, and of other parties, to prove the relationship: *Taylor on Ev.*, 6th Ed., ch. 9, secs. 576, 571; *Doe Wheeler v. McWilliams*, 2 U. C. R. 77; *Doe dem. Arnold et al. v. Auldjo*, 5 U. C. R. 171; *Doe dem. Dunlop v. Servos*, 5 U. C. R. 284; *Johnson v. Lawson et al.*, 2 Bing. 86.

RICHARDS, C. J., delivered the judgment of the Court.

The points pressed in argument were, the want of identity of Luke Carscallen's grantor with the grantee of the Crown, the name in the patent being Weis, and in the deed *Weast*.

The deed in which he was so described was in the defendant's possession, and the only title which the Carscallens, under whom she obtained her title, claimed was that very deed in which the grantor is called Weast, and they also held the original Government patent of the lot.

The fact that the deed and patent were in the possession of the Carscallen family, and had been with them since

the conveyance to Luke Carscallen in 1816, was certainly some evidence of identity to go to the learned Judge, sitting as a jury.

But when the defendant produced the will of Luke Carscallen, and claimed to hold the land under the devisees in that will, I think the learned Judge was well warranted in holding that the conveyance referred to was executed by the grantee of the Crown, particularly as it is not now shewn in any way that there was any other Francis Weis than the person who conveyed the land under the name of Weast.

The evidence of David Lockwood Carscallen certainly in terms proved he was the heir-at-law of Luke. He says, that he always understood by his mother and his father's mother that his father was the eldest son of the family, and he always understood it from his uncles, whom he had named. He also referred to the fact of his having been at one time, many years ago, called upon to join his uncle John in a mortgage as the heir-at-law of his grandfather.

The passage in Mr. Taylor's work, which the defendant's counsel probably referred to on the argument, states, 6th Ed., p. 579, sec. 576, that, "Before a declaration can be admitted in evidence, *the relationship of the declarant with the family must be established* by some proof *independent of the declaration itself*; and although, in tracing pedigrees, the Court would probably be satisfied with slight evidence on this head, since the connection of the declarant with the family might be equally difficult of proof with the very fact in controversy; yet some evidence would certainly be required."

Here the witness bore the same name as the ancestor, lived in the neighbourhood with the other sons of his grandfather, knew the names of the family, and seemed acquainted with the farms which they owned, and other minute facts concerning them, besides the circumstance of being requested as heir-at-law to join his uncle in the mortgage referred to.

No objection was suggested at the trial, that he was not a competent witness to prove the declaration of his mother, grandmother and uncles as to his heirship, for want of independent evidence of his connection with the family. Had that been suggested at the trial, no doubt Craig Carscallen, a son of Luke, who was examined as a witness on the trial, could have proved the heirship of David Lockwood Carscallen quite as well as he did himself.

If there had been any doubt on the subject of David's heirship, the other Carscallens, who were examined on behalf of the defendant, could have been asked, and could have stated what doubts, if any, existed on the subject, but nothing of the kind appears to have been attempted on the trial.

I think it was not necessary to prove a marriage, unless some doubt had been thrown on the subject.

When the statement is made, and not attempted to be contradicted, that a party named is the eldest son of another, we assume that he is what is known in law as his son, and not an illegitimate child, who in law is the son of no one.

When a statement so made is not disputed or contradicted in any way, I see no reason why the time of the Court should be taken up in pursuing enquiries which no one seems to consider necessary or desirable.

On the whole we see no grounds for interfering with the verdict, and think the defendant's rule must be discharged.

Rule discharged.

MEMORANDA.

In the vacation preceding this term, on the 28th February, ANGUS MORRISON, GEORGE ROBINSON VANNORMAN, GEORGE EYRE HENDERSON, EDWARD FITZGERALD, THOMAS HODGINS, and JOHN HOSKIN, were appointed Her Majesty's Counsel for Ontario by His Excellency the Governor General.

During this term the following gentlemen were called to the Bar:—

CHARLES VICTOR WARMOLL, RALPH HAMILTON CADDY, HUGH MATHESON, HARRY VINCENT, JAMES REEVE, MICHAEL BRENNAN, SAMUEL PLATT, WILLIAM MACDIARMID, ROBERT BALDWIN CARMAN, CHARLES ROBERT WEBSTER BIGGAR, GEORGE ALLAN MACKENZIE, JAMES STAFFORD KIRKPATRICK, HENRY JAMES MORGAN.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM MICHAELMAS TERM, 36 VICTORIA, TO MICHAELMAS TERM, 37 VICTORIA.

ACCOMMODATION MAKER.

See PAYMENT.

ACCOUNT STATED,

Opening up.—*See* PAYMENT.

ACKNOWLEDGMENT OF TITLE.

See LIMITATIONS (STATUTE OF), 2.

ACTION.

See COUNTY ATTORNEY—DAMAGES.

ADMINISTRATORS

See EXECUTORS AND ADMINISTRATORS.

AGENCY.

See DEFAMATION, 1.

Of wife for husband.—*See* HUSBAND AND WIFE, 2.

AMENDMENT.

See CRIMINAL LAW—WATERS AND WATER COURSES.

APPEAL.

See CONVICTION, 1.—TAVERN AND SHOP LICENSE.

ARBITRATION.

Submission by deed—Award after time limited—Parol enlargement by parties—Power of arbitrators to fix their own costs.—The declaration set out in full a deed of submission to arbitration between plaintiff and defendant, which deed provided that the award should be made on or before the 1st of July then next, or such further time as the arbitrators by writing, endorsed on the submission, might from time to time appoint: that the arbitrators might award what each of the parties should do; and that the costs should be in the arbitrators' discretion. It was then averred, that after the arbitrators had entered upon the reference

the plaintiff and defendant, by writing under their hands, enlarged the time for making the award to the 1st of December, and the award was made on the 30th of November; that the award directed the defendant to pay the plaintiff \$1,135.50, and fixed the arbitrators' costs at \$150, \$30 thereof to be paid by the plaintiff, and \$120 by defendant: that the plaintiff paid the whole \$150; and that all conditions were fulfilled, &c., yet that defendant not pay either the \$1,135.50 or \$120.

4th plea—That the enlargement mentioned was not made till after the 1st of July, and when the arbitrator's authority to award had ceased.

9th plea—That as to so much of the declaration as related to the sum of \$150 the award was not certain, or final.

Replication to the 4th plea—Setting out the endorsement by the parties enlarging the reference, and averring that the parties, with a full knowledge of the facts, appeared subsequently before the arbitrators, and proceeded with the reference, &c., without any objection being raised to the enlargement, and afterwards the award was made as in the declaration mentioned.

Held, upon demurrer, that the action, if founded upon the deed, must fail, the enlargement not being in accordance with the deed; but,

2. That setting out the deed in the declaration did not necessarily make it the basis of the action, for it might be treated as inducement; and the deed and the circumstances following it, read together, shewed a valid award on a parol submission by the parties, and afforded a good cause of action.

The declaration was therefore held good, as regarded the enlargement, and the fourth plea bad.

3. That the arbitrators had no power to fix the amount of their fees, and so far the declaration was bad.

4. That the replication was not a departure; but that, as the declaration shewed a new submission by the parties, the facts in the replication as to the attendance of the parties after the enlargement were immaterial, and the replication therefore bad.—*McCulloch v. White*, 331.

Proof of award by copy.]—See EVIDENCE, 1.

See VERDICT.

ASSIGNMENT.

See CHOSE IN ACTION.

INSOLVENCY, 3.

INSURANCE, 5.

ATTORNEY.

See COUNTY ATTORNEY, 1.

ATTORNEY GENERAL.

Of Ontario and Dominion--Right of to prosecute intrusion for the Crown.]—*Attorney General v. Harris*, 94.

AWARD, PROOF OF.

See EVIDENCE, 1.

BANKRUPTCY.

See INSOLVENCY.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Unstamped foreign bill accepted in Canada—Affixing double duty by agent of foreign payee.]—*Declara-*

tion on a foreign bill of exchange drawn in London, England, on defendants, and accepted by them in Canada, payable to the plaintiffs.

Plea, that the bill was not stamped at the time of acceptance, nor the stamps cancelled, nor were double stamps affixed by the plaintiffs after they acquired the knowledge that it was not properly stamped.

Replication, that the bill was duly stamped in England according to the law of England: that it was returned to the plaintiffs by defendants accepted but not stamped; and that without any delay, and in a reasonable time, the plaintiffs transmitted the bill to S. & W. in this province, and caused them to pay the double duty, by affixing stamps to the amount thereof.

Held, on demurrer, replication good; for that upon delivery of the bill by defendants to plaintiffs after acceptance the plaintiffs became "subsequent parties to such bill," within 31 Vic., ch. 9, sec. 12, as amended by 33 Vic., 13 D, and were entitled therefore to make it valid by paying the double duty.

Held, also, that the replication sufficiently alleged the due payment by plaintiffs of the double duty through S. & W. as their agents.

Held, also, that the replication should have set out the amount of the double stamps affixed, and the mode of cancellation; but that this was not ground of general demurrer. — *Wooley et al. v. Hunton et al.*, 152.

See EXECUTORS & ADMINISTRATORS.
—PAYMENT.

BILL OF LADING.

See CARRIERS,

BRIDGE.

See HIGHWAYS, 4.

BRITISH SUBJECT.

Service of process on, out of Ontario.]—See CONTRACT, 1.

BUILDING CONTRACT.

See PENALTY—WORK AND LABOR, 1, 3.

BY-LAWS.

To close and open roads.]—See HIGHWAYS, 1, 4.

To water street.]—See MUNICIPAL CORPORATIONS, 1.

As to slaughter houses.]—See MUNICIPAL CORPORATIONS, 2.

See RAILWAYS AND R. W. COS., 5.

CARRIAGE BY WATER.

See CARRIERS.

CARRIERS.

Carriage by water—Agreement to pay shortage—Right to set it off against freight.]—The plaintiffs agreed with defendant to carry 11,662 $\frac{3}{4}$ bushels of wheat from Toronto to Kingston, at 3 $\frac{3}{4}$ cents per bushel, the bill of lading being signed for the whole amount, and stipulating that "the vessel was to deliver the quantity expressed or pay shortage." On the delivery to the consignees 181 bushels short, they, representing defendant, whose interest in the wheat continued, refused to pay freight.

Held, that defendant was liable for the freight, and had no right to deduct his claim for shortage; such claim not being a liquidated demand so as to form the subject of set-off against the freight.

33 Vic., ch. 19, sec. 30, does not apply to cases between masters of vessels and owners of goods, but only between masters and consignees or endorsers for value.—*Allen et al. v. Chisholm*, 237.

See RAILWAYS AND RAILWAY COMPANIES, 3, 4, 5.

CERTIORARI.

See CONVICTION.

CHATTEL MORTGAGE.

By wife.]—See HUSBAND AND WIFE, 2.

CHOSE IN ACTION.

Assignment of.]—The defendants agreed with R. to sell and deliver to him a quantity of lumber by a certain day. After that R., with defendants' assent, assigned the contract and all his interest in it to the plaintiff, and defendants afterwards told the plaintiff's agent they would carry out the contract, and delivered some of the lumber to plaintiff.

Held, the suit being commenced before the 35 Vic., ch. 12, O., that the plaintiff was only the assignee of a chose in action, and could not sue defendants for not delivering the rest of the lumber.—*Eakins v. Gawley et al.*, 178.

COMPOSITION AND DISCHARGE.

See INSOLVENCY, 1.

CONDITIONS PRECEDENT.

See PLEADING, 3.

CONTRACT.

1. *C. L. P. Act*, sec. 44—*Contract in Ontario.*]—L., residing at Montreal, agent for defendants residing in Liverpool, telegraphed and wrote to the plaintiff at Hamilton, soliciting orders for boiler plate, to be filled by defendants, specifying the quality and terms to be delivered f. o. b. at Liverpool. Plaintiff wrote on receipt to L. at Montreal, enclosing an order for a certain quantity, to which L. answered next day that the order would go forward by next mail.

Held, that the letters and telegrams, more fully set out in the case, constituted a contract, and that such contract was made in Ontario.—*McGiverin v. James et al.*, 203.

2. *Contracts for parliamentary and departmental printing — Construction of.*]—On the 2nd of July, 1869, the plaintiff contracted with one H., as a clerk of the Joint Committee of both Houses of Parliament, to do the printing, &c., for both Houses at scheduled prices. On the 7th of October, 1869, the plaintiff contracted with Her Majesty for all the printing required for the several departments, to be specified in requisitions to be made upon him by the departments respectively, including the Postmaster-General's department, at scheduled prices; which were lower than those under the first contract, and so tendered for, as alleged by plaintiff, because he expected, in cases where similar matter was required under both contracts, to use the type set to fulfil one for the other. When the contracts were entered into the custom was for the annual reports of the heads of departments to be printed

on the order of and paid for by such departments, and the copies required for Parliament were ordered and paid for separately through the Clerk of the Joint Committee on Printing; but afterwards, by resolution of the Committee concurred in by the House, it was directed that the annual reports should be printed on the order of the committee, under the first contract, including a sufficient number for the use of the departments, with which the departments should be charged.

The reports of the Postmaster-General, having been thus ordered and printed, the plaintiff claimed to charge for the extra number required for the department under the second contract, and for the composition as though re-set for the department. *Held*, that he had no such right.

Quære, whether such an action would lie against the Postmaster-General and as to the propriety of asking the Court to pronounce an opinion.—*Taylor v. Campbell, Postmaster-General*, 264.

3. A contract to place bonds at the order of the plaintiff, does not necessarily mean to deliver them to plaintiff.—*Shanly v. Midland R. W. of Canada*, 604.

See HUSBAND AND WIFE, 4.

PENALTY, 1, 2.

PLEADING, 3.

RAILWAYS AND R. W. COS.

SALE OF GOODS.

WORK AND LABOR, 1, 2, 3.

WATERS AND WATER-COURSES, 3.

CONTRACTORS.

To build railway—Liability of for setting out fire.—See NEGLIGENCE.

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CONVERSION.

Sale of timber by deed—Parol agreement—Trover—Evidence of conversion.—Defendant, by deed dated 26th September, 1870, agreed to sell to the plaintiff all the merchantable timber, &c., on defendant's land which the plaintiff could make by the first of May, 1871; any timber or logs left, standing or cut, after that date to be the property of defendant. The plaintiff made a large quantity of timber, and drew away some of it. On the 27th March, 1871, defendant verbally gave him leave to let the balance of timber made by him remain on the lot till fall, if the plaintiff would not strip the lot too much; and the plaintiff only cut for a day or two after that. Subsequently, and after the 1st of May, the plaintiff was forbidden to take such made timber off by one K., who said he had bought it, and by defendant who, as one witness said, claimed it as his own; and the plaintiff thereupon brought trover.

Held, that there was evidence from which a jury might infer a conversion.—*Hedley v. Scissons*, 215.

CONVICTION.

1. 32-33 Vic. ch. 21, sec. 25—*Conviction under*—33 Vic. ch. 27, secs. 1, 2—*Appeal to wrong Sessions—Certiorari.*—A conviction having been made within twelve days of the next Sessions, notice of appeal was given to such Sessions, instead of to the second Sessions after the conviction, contrary to the 33 Vic. ch. 27, sec. 1, and the appeal was not heard. *Held*, that such notice being inoperative, there had, in effect, been no appeal, and the right

of certiorari was therefore not taken away by section 2.

Held, also, that, under the circumstances, notice to the Chairman of the Sessions of defendant's intention to move for the certiorari was not required.

The conviction stated, that "Joseph Caswell had on his premises a quantity of chopped wood, to wit, about half a cord, belonging to Thomas Fulton, which said Thomas states was taken and stolen from him, and which said Joseph could not satisfactorily account for its possession."

Held, that the conviction was bad, because 32-33 Vic. ch. 21, sec. 25, under which it was made, applies to trees attached to the freehold, not to trees made into cordwood, and because cordwood is not "the whole or any part of a tree," within the statute.

Semble, that the conviction was also bad for not alleging that the property taken was of the value of twenty-five cents at the least; the direction in the conviction, that the defendant should pay seventy-five cents for said wood, not being a finding that it was of that value.

Semble, that the conviction sufficiently stated that defendant was in possession of the wood.—*Regina v. Caswell*, 303.

2. *Evidence*.]—The Court will not quash a conviction upon the weight or upon a conflict of evidence, but there must be reasonable evidence to support it, such as would be sufficient to go to the jury upon a trial.—*Regina v. Howarth*, 537.

See CRIMINAL LAW—TAVERN AND SHOP LICENSES.

COPY.

Proof of Fence-viewer's award by.]—See EVIDENCE, 1.

COSTS.

See ARBITRATION—TARIFF OF FEES, 177.

COUNTY ATTORNEY.

1. *Annual certificates—Necessity for when practising only as County Attorney.*]—A County Attorney practising law only so far as required by that office, need not take out a certificate.—*Re Coleman*, 51.

2. *Municipal Act of 1866, sec. 419—County Council—Neglect to provide accommodation for officers of Justice—Right of action therefor—Damages—Receipt of part of claim in full.*]—A County Attorney and Clerk of the Peace may maintain an action against the corporation of the County for breach of duty in not providing necessary and proper accommodation for him as such officer, as required by 29-30 Vic. ch. 51, sec. 419, and may recover by way of damages in such action rent paid by him to procure such accommodation.

The Court House in which plaintiff previously had his office was burned, and the County Council informally offered him certain rooms in another building leased by them. The plaintiff considering them insufficient, as in fact they were, hired others at \$11 per month; and having sent in his bill to the Council for 17 months, they passed a resolution to pay him \$93.50 (being one half) in full of his claim, which

sum he afterwards received, and signed a receipt and the check therefor, which purported to be in accordance with the resolution. *Held*, that he was bound by such settlement, and could not recover more in respect of the 17 months rent; but that he might recover the full rent paid by him subsequent to the resolution.—*Lees v. The Corporation of the County of Carleton*, 409.

COUNTY COUNCIL

Neglect to provide accommodation for officers of justice.—See COUNTY ATTORNEY, 2.

COUNTY JUDGE.

Criminal trial before postponement of trial.—See CRIMINAL LAW.

CRIMINAL LAW.

32-33 Vic., ch. 20, sec. 69.—*Forcible seizure and kidnapping—Criminal trial before County Judge—Form of record of judgment—Postponement of trial—Amendment—Error.*—The plaintiff in error having been committed to gaol for trial on a charge of unlawfully and forcibly kidnapping and taking one Bratton without authority, with intent to transport him out of Canada against his will, was, on the 24th of June, 1872, brought before the County Judge, by whom he consented to be tried under the 32-33 Vic. ch. 35. In the record drawn up under that statute, it was charged that he did feloniously and without authority forcibly seize and confine one B. within Canada, &c., (without alleging any intent); and that he

did afterwards feloniously kidnap one B. with intent to cause the said B. to be unlawfully transported out of Canada against his will, &c. The Judge fixed the 3rd of July for the trial, and on that day the prisoner said he was ready, but upon request of counsel for the Crown the trial was postponed until the 15th of July, when the prisoner was found guilty on both counts. An amendment of the indictment was allowed by the Judge, changing the name of Rufus Bratton to James Rufus Bratton. In the notice required from the Sheriff to the Judge, by 32-33 Vic., ch. 35, sec. 2, only the charge contained in the second count of the indictment was referred to.

On errors being assigned, *Held*, that the Sessions had jurisdiction over the offence, and so the County Judge had power to try it.

Held, also, that the record was properly framed, in stating the offence charged in such form as the depositions or evidence shewed it should have been; and that the Judge's jurisdiction was not confined to the trial only of the charge as stated in the commitment.

Held, also, that the Judge had power to postpone the trial, and the record was not defective in not stating the cause of the adjournment.

By 32-33 Vic., ch. 20, sec. 69, under which the charge was made, "Whosoever, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent" to cause such person to be secretly confined or imprisoned in Canada, or to be unlawfully sent or transported out of Canada, against his will, or to be sold or captured as a

slave, is guilty of felony. *Held*, Wilson, J., dissenting, that the intent required applied to the seizure and confinement in Canada, as well as to kidnapping; and that the first count therefore was defective in not stating any intent.

Upon this ground the judgment was reversed, and under C. S. U. C. ch. 113, sec. 17, the record was remitted to the judge to pronounce the proper judgment, which would be upon the second count only.

Held also, that the amendment was authorized, under 32-33 Vic. ch. 29, secs. 1 and 71, D.

Held also, that the Court would not presume that the two counts referred to the same offence, and if it were so, duplicity would not be a ground of error.

Held, also, no objection that the jurisdiction conferred by 32-33 Vic. ch. 35, was not shewn, for the record and judgment were in the form prescribed by that Act.

Held also, that the Sheriff's notice was sufficient, as 32-33 Vic. ch. 35, sec. 2, requires it only to state the "nature of the charge" preferred against the prisoner.

The prisoner having been sent to the Penitentiary, a *habeas corpus* was ordered to bring him up to receive the proper judgment.—*Cornwall v. The Queen*, 106.

See CONVICTION.

CROWN.

Information on behalf of.—See INTRUSION.

DAMAGES.

Trespass—Right to nominal damages.—In trespass *q. c. f.* defendant justified cutting the ditch com-

plained of under an award of fence viewers, &c. The jury found for defendant on this issue, and on the general issue that there was no damage. *Held*, that as a right was involved, the plaintiff was entitled to a verdict on the general issue for nominal damages.—*Warren v. Deslippes*, 59.

See PENALTY.
SEDUCTION.

DEBTS.

Payment of.—See EXECUTORS
AND ADMINISTRATORS.

DEFAMATION.

1. *Publication by agent of Corporation—Privileged communication*—16 Vic. ch. 99, sec. 10.]—S., the general manager of the defendants' railway, without special instructions of the directors, dismissed the plaintiff, a conductor, for alleged dishonesty; and by his directions placards describing the offence, and stating the plaintiff's dismissal, were posted up in the company's private offices (in some of which they were seen by strangers), and in circular books of the conductors, for the information and warning of the company's employees, 2,000 in number.

Held, affirming the judgment of the Court below; 1. That the defendants were liable for the publication, as being an act done by their general manager in their interest and within the general scope of his duty. 2. That the communication to the employees was privileged, as made by a person having a duty or interest to persons having a corresponding duty or interest.

3. *Per Draper, C. J.*, of appeal, *Hagarty, C. J.*, *C. P.*, *Gwynne, J.*, *Galt, J.*, *Strong, V. C.*, and *Blake, V. C.* The evidence shewed a reasonable mode of publication, and no excess such as to take away the privilege or shew malice. *Per Richards, C. J.*, *Spragge, C.*, and *Wilson, J.* There was excess in the mode of publication which was evidence of malice.

4. That this was not an action within 16 Vic. ch. 99, sec. 10, and necessary to be brought within six months. *Tench (plaintiff in the Court below) respondent*, and *The Great Western Railway Co. (defendants in the Court below) appellants*, 8.

2. *Slander — Demurrer — Special damage.*]—Declaration—That the plaintiff was and is a clergyman of the Church of England, and that the defendant falsely and maliciously spoke and published of him in relation to his said profession, "He will get drunk: I have seem him drunk," meaning thereby that the plaintiff was an unfit and improper person to exercise his said calling, whereby the plaintiff was injured in his good name, &c., and shunned by divers persons—without any averment of special damage:

Held, on demurrer, declaration bad. —*Tighe v. Wicks*, 479.

3. *Justification — Evidence — Privileged communication.*]—The plaintiff, who was at one time an agent of defendants, having left them, defendants published in a newspaper an advertisement headed "Caution," and containing the words, "N. B. Notwithstanding the false statements of (plaintiff) to the contrary he is no longer an agent of this Company." Defen-

dants justified, pleading that after he ceased to be in defendants' employ, the plaintiff stated to M. & G. that he was still defendants' agent. At the trial it appeared that the plaintiff, after he had ceased to be defendants' agent, asked G., who had been insured in defendants' Company, to insure. G. believed he was still acting for defendants, but after signing the application discovered that it was to another Company, and the plaintiff then refused to allow him to withdraw. One M., who had previously insured with the plaintiff in defendants' Company, said the plaintiff called when the time to renew came, and being asked if he came to renew the policy, said 'Yes,' and expressed annoyance when he found she had already renewed it with defendants. The plaintiff denied these statements.

Held, that this evidence, if believed, was sufficient to prove the plea; and it having been withdrawn from the jury, a new trial was granted for misdirection.

Semble, that the communication was privileged; but this ground was not taken at the trial.

This case was carried to appeal, but the appeal was dismissed without any decision on the merits, there being a misunderstanding as to what took place at the trial. —*Holliday v. Ontario Farmers Mutual Fire Ins. Co.* 558.

—◆—
DELAY.

See NE RECIPIATUR.
PENALTY.

—◆—
DEPARTURE.

In pleading.]—*See* ARBITRATION —INSURANCE,

DESCRIPTION OF LAND.

1. *Patents—Construction of—Description of Land*—"N. W. $\frac{1}{4}$."—] In 1857 a Patent issued for "the North Westerly Quarter" of a 200 acre lot, the side lines of which lot ran N. 45° W., and S. 45° E., or north-west and south-east; and in 1859, another patent issued for "the S. E. $\frac{1}{2}$ of the N. W. $\frac{1}{2}$ " of the same lot.

Held, that the first patent covered 50 acres, extending half the depth and half the width of the whole lot, not 50 acres extending one fourth of the depth and the whole width.

Held, also, that the subsequent patent could not affect the construction of the first, for the question must be, what did the patent cover when it was issued.

Held, also, that the assignments to the respective patentees by the original purchaser from the crown of the N. W. $\frac{1}{4}$ of the lot, could not be resorted to aid in interpreting the patents.—*Davis et al. v. McPherson*, 377.

2, *Falsa demonstratio—Rejection of evidence.*]—Plaintiff claimed under a deed from one C. of "all that parcel of land being composed of lot number 26, as laid down on a plan of lots laid out by G. T. & W. T., being on the west side of George Street in the town of Belleville, described as follows," adding a description by metes and bounds which left a small strip at the south end of the lot uncovered.

Held, that the whole lot passed, and that the description curtailing its size should be rejected as *falsa demonstratio*.

Held, also, that evidence of what took place between the parties when C. afterwards conveyed the

small strip to defendant, and as to defendant's possession thereunder, and the acquiescence therein of the person through whom plaintiffs claimed, &c., was properly rejected.—*Gillen et ux. v. Haynes*, 516.

DESCRIPTION OF PREMISES.

In Policy.]—See INSURANCE, 4.

DRUGS AND MEDICINES.

Sale of, on Sunday]—See SUNDAY—(SELLING ON.)

EJECTMENT.

See HUSBAND AND WIFE, 3—IMITATIONS (STAT. OF.) 1, 2.—RAILWAYS AND RAILWAY COMPANIES, 2.

ENGINEER'S CERTIFICATE.

See WORK AND LABOR, 2.

EQUALITY OF CHARGES.

See RAILWAY AND RAILWAY COS., 5.

EQUITABLE PLEADINGS.

See PLEADING, 1.

ERROR.

Proceedings in.]—See CRIMINAL LAW.

ESTOPPEL.

1, *Insurance—Fixtures—Chattel or realty.*]—The plaintiff insured with defendants a barn as appurte-

nant to his freehold. After it was burned, he made a claim under the policy, still treating it as appurtenant to the freehold, but having failed in proving title to the land, he sought to recover on the ground that the barn was a chattel, and as such insured by him.

Held, affirming the judgment below, that he was precluded from setting up such a claim, and that the plaintiff could not be heard to say the barn was a chattel.

Sherboneau (Plaintiff in the Court below,) Appellant, v. The Beaver Mutual Fire Insurance Co., (defendants in the Court below,) Respondents, 1.

2. *Lease—Destruction of premises by fire—Determination of term thereby—Estoppel by judgment recovered.*—Action on defendant's covenant to pay rent, contained in a lease to him by plaintiff of a mill, for nine years from 15th December, 1868, at a yearly rent, payable half-yearly in advance, on the 15th June and December, in each year, alleging non-payment of three half-yearly instalments of rent reserved.

Plea, by way of estoppel, that previous to this action the lessee (now defendant), sued the lessor (the now plaintiff) in the County Court, alleging in his declaration that by the lease, in the event of total destruction of the mill by accidental fire, the term should cease, and the rent be apportioned; that upon such destruction on the 30th October, 1860, the said term ceased, and the lessee became liable to refund to the lessee such part of the rent paid in advance as on a just apportionment should be found due, and the lessee alleged in such action that \$137.50 thus became due

to him, for which he sued therein; that the lessor pleaded in such action that the said lease was not his deed, and issue being joined thereon, the lessee recovered judgment for the said sum of \$137.50. The plea then alleged that the judgment remained in force, and that the rent sued for in this action was rent accruing due after the said 30th October, 1869.

To this, the plaintiff replied, that after such fire the defendant continued to hold and occupy, and still holds and occupies the premises under and by virtue of the lease, and would not and did not put an end to said term or surrender said premises.

Held, a good plea; for though the plea of *non est factum* did not put in issue the destruction of the mill, and consequent determination of the term, yet these facts being necessarily averred in that action, and not denied, were admitted for the purposes of such action, and the lessor was now estopped from disputing them.—*Taylor v. Hortop*, 462.

See CARRIERS.—COUNTY ATTORNEY, 2.—HUSBAND AND WIFE, 2, 3.—INSOLVENCY, 2.—INSURANCE, 2.

EVIDENCE.

1. *Fence Viewers' award—Proof of by a copy—C. S. U. C. ch. 32, sec. 6.*—In trespass defendant justified cutting a ditch complained of under an award of Fence Viewers. The township clerk produced a copy, which he swore was a true copy of the fence viewers' award, the original being in his custody. *Held*, that such copy was admissible in evidence under C. S. U. C.

ch. 32, sec. 6, these awards being made by a statutable public officer acting in a judicial capacity, and which might affect a large portion of the public, and even municipalities.

Semble, per Wilson, J., that if the copy had been one delivered by the fence viewers under the statute, it might have been received without proving it to be a true copy.—*Warren v. Deslippines*, 59.

2. Identity—Proof of heirship.]—
In ejectment the plaintiff claimed under one D. L. C., whom he alleged to be eldest son and heir-at-law of L. C., assignee of the grantee of the Crown. The patent from the Crown was to "Francis Weis," and the deed to L. C. was signed by "Francis Weast," as a marksman. There was no direct evidence of the identity of Weis and Weast. The deed was proved by the memorial, as secondary evidence, but it was shewn to have been in the custody of the defendant, who claimed under the will of L. C., which she produced, and had been with the patent in the possession of the C. family since 1816. It was not shewn that there was any other Francis Weis except the person who conveyed as Francis Weast. The only evidence of the heirship of D. L. C. was his own. He shewed a general knowledge of the affairs and members of the family, was brought up in the neighborhood of a number of relatives, and had been informed of his heirship by his mother and his father's mother. Several uncles and other relatives were called, but no other witness was examined as to the heirship. The defendant claimed as devisee under the will of the same L. C., under whom the plaintiff claimed.

Held, that the identity of Weis and Weast, who made the deed to L. C., was sufficiently proved.

Held, also, that D. L. C.'s statements, under the circumstances, sufficiently proved his heirship, and that it was not necessary to prove the marriage of his father and mother unless it was disputed.—*Wallbridge v. Jones*, 613.

See CONVERSION.

CONVICTION, 2.

DEFAMATION, 3.

DESCRIPTION OF LAND, 2.

HIGHWAYS, 2, 3.

HUSBAND AND WIFE, 2.

EXCESSIVE DAMAGES.

See SEDUCTION—WATERS AND WATERCOURSES, 1.

EXECUTORS AND ADMINISTRATORS.

Executors—Payment of debts—29 Vic. ch. 28, sec. 28,]—Since the 29 Vic. ch. 28, sec. 38, abolishing all distinction between the different classes of debts in the administration of an estate, it is no defence for an executor sued on a promissory note of his testator, that there are specialty debts unpaid more than equal to the goods not administered.—*Parsons v. Gooding et al.*, Executors, 499.

FALSA DEMONSTRATIO.

See DESCRIPTION OF LAND, 2.

FELONY.

*Rights of married woman during husband's imprisonment for.]—*See HUSBAND AND WIFE, 3.

FENCE VIEWERS.

Fence-viewers' award—Proof of by a copy—C. S. U. C. ch. 32, sec. 6—Trespass—Right to nominal damages.—In trespass defendant justified cutting the ditch complained of under an award of fence-viewers, &c. The jury found for defendant on this issue, and on the general issue that there was no damage. *Held*, that as a right was involved, the plaintiff was entitled to a verdict on the general issue for nominal damages,

The township clerk produced a copy, which he swore was a true copy, of the fence-viewers' award, the original being in his custody. *Held*, that such copy was admissible in evidence under C. S. U. C. ch. 32, sec. 6, these awards being made by a statutable public officer acting in a judicial capacity, and which might affect a large portion of the public, and even municipalities.

Semble, per *Wilson, J.*, that if the copy had been one delivered by the fence-viewers, under the statute, it might have been received without proving it to be a true copy.—*Warren v. Deslippes*, 59.

FIRE.

Setting out—Action for.—See NEGLIGENCE.

FIXTURES.

See INSURANCE, 1.

FORCIBLE SEIZURE.

See CRIMINAL LAW.

FOREIGN BILL.

Fixing Stamps to.—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

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FORMER RECOVERY.

See ESTOPPEL, 2.

FRAUD AND MISREPRESENTATION.

See INSURANCE, 3, 5.

FRAUDS, STATUTE OF.

See SALE OF GOODS.

FREIGHT.

Set-off against.—See CARRIERS.
See RAILWAY AND RAILWAY COMPANIES, 5.

GENERAL SESSIONS.

It is improper to call on the Court of General Sessions to shew cause to a rule.—*Re Nash and McCracken*, 181.

See CONVICTION, 1.—CRIMINAL LAW.

HABEAS CORPUS.

See CRIMINAL LAW.

HEIRSHIP, PROOF OF

See EVIDENCE, 2.

HIGHWAYS.

1. *Municipal Act, 1866, secs. 325, 326, 334—By-law to open original road allowance—Want of notice—Want of form.*—Upon an application to quash a by-law to open an original road allowance, on the grounds—1. That a travelled road in lieu of it, had been laid out, and no compensation made to the owners of the land taken. 2. Of

3. That it would pass through the orchard and close to the house of the applicant, which had remained in their present position for over twenty years. 4. That sufficient notice of intention to pass inconvenience to the applicant and others, if the road were opened, had not been given. 5. That the by-law did not declare the road opened, but directed that the occupiers of the lots through which the road passed should open it.

Held, that upon the affidavits, set out in the case, the first four objections failed, and that the case was one within sections 325 and 326, and not section 334, of the Municipal Act of 1866.

Held also, that the fact that the occupiers were directed to give up possession and to open the road by a certain date, afforded no legal objection to the by-law, but the direction might be treated as a notice that it was the intention of the Council to open the road at the time named.—*Re McMichael and The Corporation of the Township of Townsend*, 158.

2. *Mandamus to open highway—Proof of confirmation by Sessions—50 Geo. III. ch. 1.*—On an application for a mandamus to open a highway, alleged to have been established by the Sessions in 1839, under 50 Geo. III. chap. 1, a surveyor's report, dated 5th July, 1839, that he had laid out the road, was produced from the Clerk of the Peace, on which was an endorsement, not dated: "allowed, Isaac Fraser, Chairman Quarter Sessions, M.D.;" but that Report bore no date of filing or entry, and there was no entry in the minutes of the July or October Sessions of any order referring to this report.

Held, that the application must fail, for want of proof that the report was filed or presented to the Sessions next after its date, or the road ordered to be opened.

Semble that if there had been a minute in the proceedings of the then next Sessions, that the report was presented and the road ordered to be opened, the Court would presume that the Sessions had done all that was necessary to warrant such an entry or minute.

Semble, that a minute of the allowance of the report, omitting to shew that the road was ordered to be opened, would not be sufficient.—*Re Lawrence and The Corporation of the Township of Thurlow*, 223.

3. *City corporation—Negligent construction and obstruction of culvert—Action for.*—In an action for negligently constructing a culvert under a public street, and altering drains so that more water was directed through said culvert than it could carry off, and for allowing the culvert to become obstructed, whereby plaintiff's premises were overflowed, &c., it appeared that the culvert, &c., had existed for twenty years, under a public street in the city, but it was not shewn by or for whom it was made, nor when the obstruction of the culvert by mud and stones, &c., took place, nor that it had been brought to defendants' knowledge.

Held, that the plaintiff must fail.—*Bateman v. City of Hamilton*, 244.

4. *Mandamus to build bridge—Public Works Act, Consol. Stat. C. ch. 28, sec. 10; schedule "A"—Authority of County to build.*—In 1856 a road company obtained leave to build a bridge at a point on the O:

river, from the Public Works Department, under whose control this portion of the river was, upon condition that in the event of navigation being resumed the bridge should be removed, and if the Government required a drawbridge should be substituted. Navigation being resumed, the bridge was ordered to be removed by the Department, and was removed by the County, under whose control the road had passed. Upon application for a mandamus to the Corporation of the County to build a swing or other bridge at the point: *Held*, that it was discretionary in the Government to allow a bridge there or not, and that the County were neither authorized nor compelled to build it. The application was therefore refused.—*Re Wescott et al. and The Corporation of the County of Peterborough*, 280.

5. *Municipal Act of 1866, sec. 323, sub-secs. 1, 2*—*Closing road and granting it to R. W. Co.—Want of notice.*—A village corporation passed a by-law to close a street and allow a railway company to appropriate it to build an embankment upon for railway purposes, without any notice to the applicant herein, who had land on the street, or any notice as required by the Municipal Act of 1866, sec. 323, sub-secs. 1, 2. The street, however, had been only partially graded, and was scarcely fit for use, no one but the applicant seemed to have any cause of complaint, the injury to him was small, and the railway company had built their works upon the street at a large expense, and made openings for public traffic, and had opened another street in lieu of and as near as possible to the road so taken. Moreover the

council had acted on decisions of this Court, and could probably do all that had been done by giving the notices and passing another by-law.

The Court under these circumstances refused to quash the by-law, but discharged the rule without costs.

Quære, per Wilson, J., as to the power of a Municipal Council to close up highways and grant them to a railway company, without notice.

On such an application the railway company should be made a party to the rule.—*Re McKinnon and The Corporation of the Village of Caledonia*, 502.

HUSBAND AND WIFE.

Married women's Property Act, 1872—Construction of as to real property.—Sec. 1 of 35 Vic. ch. 16, so far as regards "the real estate of any married woman which is owned by her at the time of her marriage," applies only to marriages which take place after the passing of the Act.

When, therefore, the plaintiff, who married in 1851, had lived upon the land in question, which was his wife's property, from 1852 until 1861, and had then joined with his wife in a lease to defendant for ten years:

Held, that on the expiration of such lease the plaintiff alone might maintain ejectment.—*Dingman v. Austin*, 190.

2. *Purchase of goods and chattel mortgage by wife—Agency implied—Leave and License—Evidence.*—The plaintiff went to British Columbia nine years before this action, leaving his wife here, to

whom he wrote, and occasionally sent money. She procured the defendant to endorse a note made by her for the price of furniture to carry on a boarding house (which she subsequently carried on with the plaintiff's knowledge,) and executed to defendant a chattel mortgage under seal in her own name on said furniture. The rent of the house being in arrear, and part of the mortgage money overdue, the landlord distrained, and the defendant enforced his mortgage; and the plaintiff's wife not dissenting, but rather assenting, the goods were sold off, and the balance after the payment of rent and mortgage was handed over to her. The plaintiff thereupon sued the defendant in trespass and trover.

Held, that the wife was the agent of her husband, the plaintiff, in respect to purchasing the furniture and to do all that was necessary to acquire it.

Held, also, assuming that she exceeded her authority in giving a mortgage under seal, yet as the mortgage would be valid without a seal in her own name, the seal did not make it invalid for all purposes, or prevent it from being given in evidence as a justification derived from the plaintiff through his agent of the acts complained of.

Held, also, that as by this action the plaintiff ratified the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mortgage, which formed part of the whole arrangement.

Semble, that the wife standing by and permitting the sale of the property under the mortgage, was some evidence under the plea of leave and license.

Per Wilson, J.—Under C. S. U. C., ch. 73, the wife had power to

buy the furniture with her own means and on her own credit, and to deal with it as if sole and unmarried; and in the ordinary exercise of that right she could give a mortgage by deed in her own name as if a *feme sole*. — *Halpenny v. Pennock*, 229.

3. *Ejectment—Lease—Surrender by operation of law—Married women—Rights, &c., of during imprisonment of husband for felony.*—Ejectment by H. C. and E. C. his wife. The defendant S. limited his defence to two shops erected on the land sued for, and defendant G. to one of said shops as tenant of S. It appeared that while H. C. was in prison for felony, and on the 29th October, 1869, S. leased the premises to E. C. for two years from the 1st of June, 1870, at \$200 a year, and S. covenanted to erect on the premises by the 1st of June, a tavern worth at least \$1000. Afterwards S. proposed to erect, and did erect without opposition from E. C. a more expensive hotel, with two shops under it, (which were the shops referred to) and made other important alterations, at a total expense of \$3000. Defendant G. applied to E. C. for a lease of one of the shops, and was referred to S., and S., after seeing E. C., who said she did not want the shops, leased one to G. E. C. afterwards refused to give up possession until paid for delay in getting possession of the tavern until after the 1st of June. The amount was left to arbitration, and E. C. said she would allow G. to take possession, but after he had placed some of his goods in the premises, she put them out and locked the doors, which the defendants then forced open and took possession. H. C. was during these

transactions still undergoing his sentence.

Held, that during her husband's imprisonment for felony E. C. could contract, at all events as to what might be regarded as goods and chattels, as a *feme sole*.

Semble, that a married woman may execute a deed without her husband joining, during the imprisonment of the husband as a felon.

Held, also, that the facts above set out and more fully appearing in the report, constituted a surrender by operation of law by E. C., or at all events estopped all parties from saying that S. had not the right to lease to G.—*Crocker et ux. v. Sowden et al.*, 397.

4. *Married Women's Property Act of 1872, sec. 9.*]—Declaration on a contract by plaintiff to build a house for defendant, alleging completion and non-payment; and on the common counts.

Plea: that the making the contract and the contracting of the debts was before the Married Women's Property Act of 1872, and that at that time defendant was, and still is, the wife of T. H.

Replication: that the debt was the separate debt of the defendant, and was contracted for her own benefit, and in respect of her separate estate.

Held, following *Merrick v. Sherwood*, 22 C. P. 467, replication good, for that the Married Women's Act, of 1872, sec. 9, was retrospective.

Semble. the right to sue given by 35 Vic. ch. 16, sec. 9, is a mere matter of procedure, and imposes no new liability on the married woman.—*Steels v. Hullman*, 471.

IDENTITY.

Proof of.]—See EVIDENCE, 2.

INDICTMENT.

Amendment of.]—See CRIMINAL LAW.

INFANT.

See RAILWAYS AND RAILWAY COMPANIES, 3.

INFORMATION OF INTRUSION.

See INTRUSION.

INSOLVENCY.

1. *Composition and discharge—Pleading.*]—To an action upon promissory notes, by the payee against the maker, the defendant pleaded that after giving the note he made a voluntary assignment in insolvency, and thereby obtained a discharge by a deed of composition and discharge duly executed under the Act, in the schedule to which the plaintiff appeared as a creditor. The plaintiff replied setting out the composition deed verbatim. It purported to be made between defendant of the second part, and twenty-eight persons of the first part, described as "all the creditors of said insolvent constituting more than the majority in number of those of the creditors of said insolvent who are respectively creditors of said insolvent for sums of \$100 and upwards, and representing more than three-fourths in value of their liabilities which are subject to be computed in ascertaining the proportion in number and value of his creditors who have executed these presents." From this it appeared that three creditors were named in the schedule for an aggregate amount of

\$1,276 who were not named in the deed as parties, though two of them had executed it. The replication was demurred to, and exceptions taken to the plea.

Held, that the plea was bad, in not shewing that the deed was made for the benefit of all the creditors; and that the replication to it shewing that the deed was in fact not so made, and that it had not the assent of those creditors who represented three-fourths of the value of his liabilities which were subject to be computed for that purpose, was good.

Held, also that the plea was defective in not shewing that defendant was a trader, but that the replication setting out the deed, in which he was described as merchant, cured this defect.

It is not necessary that an assignee in insolvency should be a party to a deed of composition and discharge.

Held, also, that it was not necessary here, though in some cases it would be, to aver that the parties to the deed were creditors within the meaning of the Act, or to negative the plaintiff being a special creditor, it appearing sufficiently from the nature of the claim sued for that he was not.—*Dredge v. Watson*, 165.

2. *Insolvent Act of 1869—Estoppel—Finality of proceedings in Insolvency.*—Declaration by plaintiff as assignee in Insolvency of McM., on the common counts.

Plea, that McM. was not a trader within the meaning of the Insolvent Act of 1869.

Replication by way of estoppel, setting out in full the proceedings and adjudication in the Insolvent Court, shewing that an attachment

in Insolvency issued against McM., that he petitioned the Judge to set it aside on the ground, among others, that he was not a trader within the Act; that the Judge decided that he was a trader; and that such decision was affirmed on appeal by one of the Judges of the C. P.

Held, on demurrer, plea good; though the more formal plea would have been one denying that the plaintiff was assignee of McM. in manner and form, &c.

Held, also, replication bad, as such adjudication and proceedings were not conclusive, at all events as against a debtor of McM., but were subject to question in this Court.—*Groves v. McArdle*, 252.

3. *Causes of action passing to assignee—Rescinding Judge's order.*—On the 6th February, 1873, a rule *nisi* was granted to set aside a verdict for defendants, and on the 10th February, defendants obtained an order to stay proceedings until security was given for costs, on the ground that the plaintiff had become insolvent. The declaration contained three counts: 1. On a fire policy. 2. In trover, alleging as special damage that plaintiff's business was stopped, and he lost customers. 3. In trespass to goods, alleging similar special damage. No objection was made in chambers that the causes of action in the second and third counts did not pass to the assignee. On application to the Court in Easter Term.

Held, that the causes of action under the first and second counts passed to the assignee, for as to the second, as the conversion, the primary cause of action, passed to the assignee, the special damage

dependent upon it could not be sued for by the debtor; but that the cause of action in the third count did not pass, being for a personal claim of the debtor independent of his right of property.

Held, therefore, that as to the third count the order should not have been made: that being made without authority it might be rescinded as to that count, notwithstanding the delay in moving against it; and that the action might be stayed on one count, leaving it to proceed on the others. — *Smith v. Commercial Union Ins. Co.* 529.

INSURANCE.

1. *Fixtures — Estoppel.*] — The plaintiff insured with defendants a barn as appurtenant to his freehold. After it was burned, he made a claim under the policy, still treating it as appurtenant to the freehold; but having failed in proving title to the land, he sought to recover on the ground that the barn was a chattel, and as such insured by him.

Held, affirming the judgment below, that he was precluded from setting up such a claim, and that the plaintiff could not be heard to say the barn was a chattel. — *Sherboneau v. The Beaver Mutual Fire Insurance Company*, 1.

2. *Policy not under seal — Pleading — Waiver of conditions — Estoppel in pais — Remarks as to unreasonable conditions.*] — Declaration on a fire insurance policy not under seal, alleging that, subject to certain conditions, the plaintiff was entitled to recover for loss of goods by fire, and setting out the third condition, which was to the effect that the plaintiff should give notice of every altera-

tion, &c., in the building in which the goods insured were contained, and should have the allowance of the same endorsed upon the policy; and the 14th condition, to the effect that the plaintiff was to give a written statement of his loss, within 14 days after the fire, specifying the particulars and verifying it in the manner described in the condition. The declaration averred that the plaintiff was ready and willing to give the notice in the 14 days as required, but within that time the defendants took possession of the goods which remained, and prevented the plaintiff from giving the required account, and the defendants waived the said condition, and discharged the plaintiff from fulfilling the same. And as to the third condition, it was averred that the plaintiff did give notice of every alteration, &c., in writing, and requested the defendants to allow the same in accordance with the conditions, and the defendants accepted the notice and waived the endorsement upon the policy, and discharged the plaintiff from requiring the same to be so endorsed, and afterwards continued and confirmed the policy.

Fifth plea, to the whole count, that by another condition in the policy, no condition should be deemed to have been waived except by writing endorsed upon the policy, and signed by the general agent, and that the condition (14th) requiring a statement of loss to be put in in 14 days, was not so waived.

Eighth plea, setting out the third condition, requiring notice of change in building, &c., and averring that there had been such change, and the plaintiff did not notify the defendants of it in writing, nor was

it allowed by endorsement, nor did the defendants waive such endorsement.

Ninth plea. Setting up the same defence as to the 3rd condition as the 5th plea did to the 14th, that the condition could not, under the terms of another condition in the policy, be waived, except by writing endorsed on the policy, and that it was not so waived.

Replication by way of estoppel, to so much of the 8th plea as alleged that the alteration was not allowed by endorsement, and that the defendants did not waive such non-endorsement, that the plaintiff gave notice in writing of such alteration, and delivered the policy to the defendants to have the allowance of such alteration endorsed thereon, and also to have the allowance of a further assurance endorsed thereon, and the defendants accepted it for these purposes, and afterwards endorsed the allowance of the further insurance thereon, and returned the policy to the plaintiff, and informed him that all had been done under the policy and conditions which was necessary.

The defendants rejoined to this replication the condition already mentioned, that no condition could be waived except in writing endorsed on the policy.

The plaintiff demurred to the pleas and to the rejoinder; and the defendants excepted to the declaration, and demurred to the replication.

Held, as to the declaration: 1. That the averment of prevention by defendants was a perfect excuse for non-compliance with the 14th condition. 2. That the averment of waiver and discharge of the third condition was sufficient, as being a parol discharge to the plaintiff from

obtaining performance by the defendants of an act which they were to do under an instrument not under seal.

Jacobs v. The Equitable Insurance Co., 17 U. C. R. 35, dissented from.

The fifth plea was held bad, as being pleaded to the whole count, and answering only the act of waiver alleged, not the alleged prevention by defendants of performance; and as setting up a want of waiver in a particular form to a ground of excuse (*i. e.*, prevention of performance by defendants) not dependent on the waiver mentioned in the plea.

Semble, that the declaration alleged separately such prevention, and that defendants in some other way waived performance; and did not state the waiver as a result merely of the alleged prevention.

The eighth plea held good, as it concluded with a good traverse, that the defendants did not waive the endorsement of the alteration, &c.

The ninth plea was also held sufficient, because it properly disclosed a further reason why the waiver alleged by the plaintiff should not be effectual, in this, that the fact of waiver was required to be verified in a particular form, and that such form had not been observed.

The replication was held good as an estoppel, for the plaintiff was led by conduct and acts of the defendants to believe and might well have believed that no advantage would be taken of the non-endorsement on the policy of the alteration, and might in consequence have refrained from insuring elsewhere.

The rejoinder was held good, for it was not a departure from but

supported the plea denying the waiver, and shewed why the estoppel against such denial should not apply.

Remarks as to the conduct of business by insurance companies, and the necessity of legislative interference to prevent the multiplication of unreasonable conditions, and protect the public.—*Smith v. Commercial Union Ins. Co.* 69.

3. *Over valuation.*]—In an action on a Mutual Fire Insurance Policy for \$1,800, upon goods which the insured, at the time of insuring, estimated at a cash value of \$4,500, the jury were asked, among other questions, "Did T. (the insured) reasonably and actually believe that such stock in trade was then of the fair value of \$4,500." They answered, "We cannot believe that he could think such a thing;" but said, when they handed in their answers, that they wished the verdict to be entered for \$1,100, which they found to be the loss sustained.

Held, following *Riach v. Niagara District Mutual Fire Insurance Co.*, 21 C. P. 464, that on the finding defendants were entitled to succeed, and a nonsuit was ordered.—*Newton* (Assignee of Todd, an Insolvent), *v. Gore District Mutual Fire Insurance Co.*, 92.

4. *Description of premises in policy—Mistake—Reforming policy.*]—On the 9th of August, 1871, the plaintiffs applied to the defendants through their agent, H., at Hamilton, for an insurance on goods to the amount of \$6,000, contained in a store on the south side of King street, described in the application as No. 272, in defendants' special tariff book, and marked No. 1, on a diagram endorsed on the application, and received from H. a letter and receipt

for the premium, \$37.50, being at the rate of 62½c. on the \$100. On the following day the plaintiffs notified H. that they had added to their premises two flats in the adjoining building (which would be No. 273 in defendants' special tariff book), and had placed part of their goods there. A few days after, H. inspected the building, and said an extra rate would be required. On the 29th, H. notified defendants of the opening into the adjoining building, and asked as to the rate to be charged. The secretary at Montreal on receiving the letter pencilled on the application the fact of the opening, and he had previously drawn on the application a sketch of the premises taken from a former policy, when the plaintiffs only occupied 272. An increased premium, making in all, one per cent, was fixed and paid by the 23rd September, and the policy issued immediately thereafter, dated as of the 9th of August, describing the premises substantially as in the application, and referring to the sketch and pencilled opening through which it was said there was a communication with the adjoining house, No. 273. The policy was handed to the plaintiffs in September, 1871, and the premises were burned in March, 1872.

Held, that the alteration in the premises having been made before the policy issued, the description therein did not extend to or cover the goods which were in the adjoining flats added when the extra premium was paid and the policy issued, and that the plaintiffs suing upon the policy were bound by the description contained in it.

Semble, however, that the policy was not in accordance with the intention of the parties, the notice to

and knowledge of H. as to the storing goods in 273, being notice and knowledge to the defendants; and that in equity the policy might be reformed.—*Wyld et al. v. The London and Liverpool, and Globe Insurance Company*, 284.

5. *Insurance by mortgagee—Right of insurers to an assignment of the mortgage—Pleading.*—Declaration upon a fire insurance policy for \$1000, upon a brick house.

2nd plea: on equitable grounds, that by the policy, whenever the defendants should pay any loss to the insured, he agreed to assign over all his right to recover satisfaction therefor from any other person, town, or other corporation, or to prosecute therefor at the charge and for the account of defendants if requested: that the plaintiff was the mortgagee of the said premises insured, and that although the defendants have always been ready, and have offered to pay the plaintiff the insurance and premium, upon the plaintiff assigning the said mortgage, and although the defendants have tendered an assignment, the plaintiff refused to assign.

Equitable replication: that the mortgage contained a provision requiring the mortgagor to insure the premises, and that the plaintiff, under the instructions of the mortgagor, and at his costs and charges, and as his agent, insured the said buildings.

Rejoinder, on equitable grounds: that by one of the conditions of the policy, if any person insuring made any misrepresentation or concealment, such insurance should be void, and that at the time of insurance the plaintiff concealed from the defendants that he insured under the instructions and for the benefit of the mortgagor, whereby, &c.

Held, on demurrer, plea bad; for if it was intended to rely upon the condition, the mortgage security would give the plaintiff no right to recover from the mortgagor for the loss insured against, but only to recover his debt; and if it was intended to set up, apart from the condition, that because the plaintiff was mortgagee the defendants' on paying his mortgage debt, were entitled to the assignment, then enough was not shewn to entitle defendants in equity to a perpetual and unconditional injunction.

Per Wilson, J., the plea was also bad: 1. Because the alleged agreement being that whenever the defendants should pay any loss the plaintiff would assign the mortgage or prosecute for satisfaction if requested by defendants, the defendants were bound first to pay; and 2. Because it was not shewn that the insurance money was as large or larger than the amount of the mortgage.

Semble, per Wilson, J., that defendants had not the right under such agreement to elect whether the plaintiff should assign or prosecute.

Held, also, that the replication shewed a good answer to the plea.

Held, also, rejoinder bad, for departure, and because the plaintiff having stated that he was mortgagee, was not bound, unasked, to disclose that he was insuring for the mortgagor, and the concealment was of an immaterial matter.

Quære, whether when a mortgagee insures property mortgaged to him, the Insurance Company can, in case of loss, compel him to assign to them the mortgage.—*Reesor v. Provincial Insurance Co.*, 357.

See DEFAMATION, 3.

INTERIM SESSIONS.

See CRIMINAL LAW.

INTRUSION.

Information for intrusion—Pleading.]—To an information of intrusion, filed by Her Majesty's Attorney General for the Dominion, prosecuting for Her Majesty, the defendant pleaded that the lands mentioned were not Ordnance property or property in any manner under the control of the Dominion of Canada, but, on the contrary thereof, the said lands became upon the passing of the B. N. A. Act, 1867, and still are the property of the Province of Ontario, in which they are situate.

Issue having been joined on this plea, the title at the trial was gone into, and a verdict entered for the Crown, with leave to defendant to move to enter it for him.

Held, that the Crown was clearly entitled to recover, for (among other reasons) the plea set up no title in defendant, and admitted the Crown title by stating the lands to belong to this Province; and the fact of the Attorney-General for Canada prosecuting for the Crown, could not shew that a Dominion title was necessarily claimed.

Remarks upon the form of, and defects in, the *Nisi Prius* record *Attorney General v. Harris*, 94.

JUDGMENT.

See CRIMINAL LAW—ESTOPPEL, 2.

JUSTICE OF THE PEACE.

See CONVICTION.

KIDNAPPING.

See CRIMINAL LAW.

LACHES.

Relief from ne recipiatur.]—See NE RECIPIATUR.

LANDLORD AND TENANT.

See ESTOPPEL, 2—HUSBAND AND WIFE, 3.

LEASE.

See ESTOPPEL, 2.—HUSBAND AND WIFE, 3.

LEAVE AND LICENSE.

Trespass to land—Obstructing light—Revocation.]—Declaration. First count: Trespass, for breaking and entering plaintiff's close, breaking down plaintiff's wall, carrying away part of the material, and building a house against the wall. Second count, for obstructing an ancient light of the plaintiff's.

Plea: Leave and license; to which, so far as it applied to the second count, the plaintiff replied a revocation of the leave before any of the grievances were committed. It appeared that the plaintiff and defendant owned adjoining shops in a city, and that defendant, wishing to improve his own premises, obtained the plaintiff's leave to build on the partition wall owned by plaintiff. It was understood that defendant should pay for this, but the price was never fixed. Defendant finished his building without any objection being made, but afterwards they disagreed as to the sum to be paid, and the plaintiff brought this action, having first

served a notice revoking the license and requiring defendant to remove the building :

Held, as to the first count, that the plaintiff must fail, for the gravamen of the charge was the breaking and entering the close, the rest being merely aggravation, and no trespass was shewn to be done after the leave was revoked.

Held, also, as to the second count, that the evidence proved the plea of leave and license, and that the replication setting up a revocation before the commission of any of the grievances was not proved.

Semble, that the license having been acted upon, and expense incurred by defendant, it could not be revoked.—*Morgan v. Lailey*, 369.

See HUSBAND AND WIFE, 2.

LIBEL AND SLANDER.

See DEFAMATION.

LICENSE.

See LEAVE AND LICENSE.

LIMITATIONS (STATUTE OF).

1. *Ejectment* — *Nonsuit*.] — In ejectment, where defendants claimed title by possession, and the plaintiff was found to have been out of possession for twenty years, the jury were directed that to entitle defendants to a verdict, they must shew twenty years continuous possession in themselves, and those under whom they claimed.

Held, a misdirection; for an owner out of possession for twenty years may be barred, though no one of

the occupants may have obtained a statutory title.—*Kipp v. The Synod of the Diocese of Toronto*, 220.

2. *Ejectment* — *Occasional visits by true owner*—*Acknowledgment of title*—*Tenancy at will*.]—Ejectment for three acres and one acre, separate parcels of lot 36 in the 2nd concession of Lochiel. On the 16th of June, 1839, C. McD., mother of the plaintiff, became owner of the whole lot by conveyance from the grantee of the crown.

On the 6th of April, 1847, she conveyed the whole lot to J. N. W., also her son, by a deed which was to be given to him when he should give security for her support. This he did by bond, and the deed to him was registered on the 20th April, 1857.

On the 16th April, 1849, however, she conveyed to the plaintiff, another son, the three acre parcel, by a deed registered 2nd October, 1849.

On the 10th June, 1851, J. N. W. conveyed the one acre parcel to plaintiff.

On the 17th May, 1862, J. N. W. gave a mortgage on the lot to plaintiff, registered 23rd September, 1862, to secure advances made by plaintiff to pay off a previous mortgage to defendant, which mortgage to plaintiff contained a reservation "of four acres already made by deeds of conveyance to the party of the third part (plaintiff) from C. McD. and J. N. W." This mortgage was discharged before this suit was commenced.

On the 28th December, 1868, J. N. W. conveyed the whole lot to defendant, without any reservation of the three or one acre parcels.

J. N. W. lived on the lot and used it as owner from the date of

the conveyance to him in 1847 till he sold it in 1868. The plaintiff went to the U. S. in 1849, but came back yearly and stayed on the lot, where his mother also lived with J. N. W. In his evidence J. N. W. said he always considered the four acres to be his brother's, and did not hold them adversely, but made no difference in working them.

Held, as to the three acre parcel, that the plaintiff was barred by the Statute of Limitations, notwithstanding his annual visits to the land.

Held, also, *Wilson*, J. dissenting, that the reservation in the mortgage to the plaintiff by the defendant, dated 17th May, 1862, was not an acknowledgment of the plaintiff's title at that time to the lands so reserved.

Held, also, as to the one acre conveyed to plaintiff by J. N. W. on 10th June, 1851, that J. N. W. being allowed to remain in possession was a tenant at will, which tenancy ended on the 10th June, 1852, and the action having been commenced on the 14th June, 1871, the plaintiff was not barred.

Per *Wilson*, J., taking the words in connection with the transactions between the parties, the one conveying and the other receiving the mortgaged land, the reservation in the mortgage of the 17th May, 1862, was an express and unequivocal declaration in writing that the plaintiff's title to the four acres was valid and subsisting at that time.—*Williams v. McDonald*, 423.

See DEFAMATION, 1.

LIQUIDATED DAMAGES.

See PENALTY, 1, 2.

MANDAMUS.

See HIGHWAYS, 2, 4, 5.

MARRIED WOMEN.

Rights of during imprisonment of husband for felony.—See HUSBAND AND WIFE, 3.

MARRIED WOMEN'S PROPERTY ACT, 1872.

See HUSBAND AND WIFE, 1.

MEMORANDA.

176, 470, 620.

MISTAKE.

In insurance policy.—See INSURANCE, 4.

MONOPOLY.

See MUNICIPAL CORPORATIONS, 2.

MORTGAGE.

Right of Insurance Co. to assignment of before payment of his loss to mortgagee, who has insured.—See INSURANCE, 5.

MUNICIPAL CORPORATIONS.

1. *Municipal Act, secs. 226, 340*—*By-law to water a street.*—Under sub-sec. 2 of sec. 340 of the Municipal Act, 1866, a Municipal Corporation may pass a By-law to water a portion of a street only.

It is not necessary in such a By-law to name a day when it shall take effect.

Where such a By-law provided that a special rate should be levied

to be estimated on the contract price for such watering, without naming the sum to be raised; but the work had been done—the Court refused, in their discretion, to quash the By-law. Where the By-law ordered a special rate on a portion of a street to pay for watering “said street.”

Held, that “said street” referred to only “said portion of that street.”—*Re Platt v. The Corporation of the City of Toronto*, 53.

2. *Municipal Act of 1866, sec. 296, sub-sec. 23*—Power with regard to slaughter houses—*By-law void for partiality.*—A by-law that “No person shall keep a slaughter-house within the city without the special resolution of the Council:” *Held*, not within the power given to the corporation by the Municipal Act of 1866, sec. 296, sub-sec. 23, to prevent or regulate the erection or continuance of slaughter houses, &c., which may prove to be a nuisance; because it permitted favoritism by the council, and might be exercised in restraint of trade or used to grant a monopoly; and all persons therefore were not placed, or might not be placed, or were liable to be not placed, on the same footing who followed or desired to follow the said trade.—*Re Nash and McCracken*, 181.

See HIGHWAYS.

MUNICIPAL LAW.

See COUNTY ATTORNEYS, 2.

MUNICIPAL CORPORATIONS.

NAVIGABLE WATERS.

Obstruction of.—See WATERS AND WATER COURSES, 1.

NE RECIPIATUR.

Relief from—Delay.—On the 6th February, 1873, a rule *nisi* was granted to set aside a verdict for defendants, and on the same day defendants obtained a summons to stay proceedings until security was given for costs, on the ground that the plaintiff had become insolvent, which summons was made absolute on the 10th, with leave to the plaintiff, nevertheless, to take out and serve his rule *nisi*. Through misapprehension the rule was not issued, and a *ne recipiatur* was entered on the 14th February. On application to the Court in Easter term:

Held, that the plaintiff might be relieved from the *ne recipiatur*, on payment of costs, notwithstanding the delay.—*Smith v. Commercial Union Insurance Co.*, 529.

NEGLIGENCE.

Setting out fire — Liability of Railway Co. for negligence of sub-contractor—Interference of the Company's engineer.—The plaintiff owned land in Nottawasaga, through which the defendants constructed their railway. Portions of the work of construction, including the cutting, grubbing and clearing the track of trees, &c., to be done to the satisfaction of the defendants' engineer, were let to M. & G., who sub-let it to other parties. The engineer, who had power to urge on the work, but no control over the men, directed the workmen, servants of the sub-contractor, to hurry on, and told them to burn the brush and timber in the centre of the track, not on either side. The fire was lit in July, and spread into the plaintiff's land. In October, the

fire having smouldered meanwhile, as the plaintiff alleged, broke out afresh, and did the greater part of the damage.

Held, that the contractors, not the defendants, were *primâ facie* responsible for the injury, if caused by negligence on the part of those who set out the fire; and that the evidence, more fully set out in the report, did not show such an interference by the engineer as would make defendants liable.

Held, also, following *Dean v. McCarthy*, 2 U. C. R. 448, that a prietor setting out fire on his own land in order to clear it, is not an insurer that no injury shall happen to his neighbor, but is responsible only for negligence; *Fletcher v. Rylands et al.*, L. R. 3 H. L. 330, commented upon.

Held, also, that if the action could be maintained, only the damages awarded for the first fire in July should be recovered, as the weight of evidence showed that the second fire arose from other causes than the first fire.—*Gillson v. North Grey R. W. Co.*, 128.

[This case has been argued in appeal, and stands for judgment.]

See COUNTY ATTORNEY, 2—HIGHWAYS, 3—PLEADING, 2—RAILWAYS AND RAILWAY Co's., 3, 4.

NEWSPAPERS.

Printing and publishing.—See PARTNERSHIP.

NEW TRIAL.

Action against R. W. Co—Mistaken sympathy of Jury.—In an action against a Railway Company for killing the plaintiff's horses by collision at a crossing, the weight of evidence went strongly

to shew that the plaintiff was intoxicated, and the accident caused by his own negligence and bad driving. The jury, however, found in his favor.

The Judge who tried the cause being dissatisfied with the verdict, and there being reason to believe that it arose from mistaken sympathy on the part of the jury for a poor man as against a railway company, the Court granted a new trial with costs to abide the event.—*McGunnigal v. Grand Trunk R. W. Co.*, 194.

See SEDUCTION.—WATERS AND WATER COURSES, 1.

NISI PRIUS RECORD.

See INTRUSION.

NOMINAL DAMAGES.

See DAMAGES—VERDICT, 2.

NONSUIT.

See INSURANCE, 3—LIMITATIONS, STATUTE OF, 1.

OPENING HIGHWAY.

See HIGHWAYS, 1, 2.

ORDERS.

See RULES AND ORDERS.

PARLIAMENTARY PRINTING.

See CONTRACT, 2.

PAROL AGREEMENT.

See TIMBER.

PAROL EVIDENCE.

See DESCRIPTION OF LAND, 2.

PARTNERSHIP.

33 Vic. ch. 20—*Partnership, registration of—Printing and publishing a newspaper—“Trading purposes.”*—*Held*, that the business of printing and publishing a newspaper constitutes the partners employed in it a partnership “for trading purposes,” within the meaning of 33 Vic. ch 20, sec. 1, O., and liable to the penalty for not registering such partnership.

The defendant, owner and publisher of a newspaper, entered into an arrangement with C., by which C. was to purchase half the interest in the paper and plant for \$850, to receive \$500 a year for his labor out of the business, and half the remainder of the net profits. Afterwards one F. came into the concern, paying a certain sum, and he and C., being practical printers, were each to have \$500 a year for their labor out of the business, after paying expenses, and to own each one-third of the plant; and the balance of the net profits, if any, was to be divided equally among the three. Nothing was said about losses in either case.

Held, that a partnership existed in each case.—*Pinkerton qui tam v. Ross*, 508.

PATENTS.

Construction of.—See DESCRIPTION OF LAND, 1.

PAYMENT.

Promissory Note—Accommodation maker — Principal and surety —

Opening up an account stated.—Action upon a promissory note made by defendant payable to one M., and endorsed by M. to the plaintiffs. Third plea: that the note was made for the accommodation of M., and before suit was paid by M. to the plaintiffs.

At the trial it appeared that defendant made the note for M.'s accommodation, of which the plaintiffs were aware, and that there was an agreement between the plaintiffs and M., to which defendant was not a party, and by which if on a final settlement of accounts the plaintiffs were indebted to M., such balance should be applied first in liquidation of this and other notes, and in the event of a loss it was to be borne *pro ratâ* by the several indorsers. It also appeared that there had been a settlement between M. and the plaintiffs, signed by them, by which M. was found to be indebted in a large sum; but M. in his evidence stated that he had not got credit in that balance for some of his timber taken by plaintiffs. Defendant offered evidence to prove that under the accounts between M. and the plaintiffs there was a balance due to M., which, under the agreement referred to, would shew this note to be paid by M.

Per *Morrison, J.*—Such evidence was properly rejected, and could not be given under the plea of payment by M., but the agreement and facts relied on should have been pleaded specially.

Per *Wilson, J.*—The evidence was admissible, and it was competent to defendant to open up the account between M. and the plaintiffs.—*Roche et al v. Kempt*, 387.

See EXECUTORS AND ADMINISTRATORS.

PENAL ACTION.

See PARTNERSHIP.

PENALTY.

1. *Building Contract—Penalty or liquidated damages—Work delayed by defendant—Pleading.*]—Plaintiffs agreed to do certain iron work on a building for defendant, and to finish it on or before 1st of July, 1871, “under a forfeiture of \$50, as liquidated damages, for every week the work remains unfinished after the said time.”

Held, that the \$50 per week was liquidated damages, not a penalty.

In an action on the common counts for such work, defendant pleaded that the work was done under the above agreement, and that the plaintiffs, in violation of the agreement, and without any default of the defendant, did not complete the works by the day appointed, and that defendant, under the agreement, was entitled to deduct \$1207 for the delay. The plaintiffs joined issue. *Held*, that the plaintiffs, under this issue, could not show that the delay was caused by defendant or by other workmen of his; but a new trial was granted, with leave to amend; and *Seemle*, that the plaintiffs should reply specially the nature of the delay caused by defendant. —*Hamilton et al. v. Moore*, 100.

2. *Contract—Liquidated damages—Work performed after contract time.*]—Plaintiffs on the 31st May, 1871, contracted to make and complete the iron work upon a building put up for defendant by 1st July, 1871, and to pay \$50 per week as liquidated damages for every week the same should remain unfinished after that time. Defen-

dant had not the building ready to receive the iron work for nineteen weeks after the 1st of July, but the plaintiffs did not finish their work for more than seven weeks after they were enabled to begin.

Held, that such a special provision as that for liquidated damages would not be considered as incorporated in the new contract under which the work was done after 1st July, though the plaintiffs might be liable for the delay in an action for damages.—*Hamilton et al. v. Moore*, 520.

See WORK AND LABOUR.

PEPPERMINT LOZENGES.

See SUNDAY, SELLING ON.

PLEADING.

1. *Equitable Pleading—Rules of.*]—It is not necessary in equitable pleadings at law, to follow the rules of equity pleading, and it is sufficient, therefore, in such a pleading to allege that defendants, for good and sufficient consideration, discharged the plaintiff, &c., without averring the nature of the consideration relied on.—*Lewis v. Manning*, 2 U. C. L. J., N. S., 247 followed. —*Simpson v. Kerr et al.*, 345.

2. *R. W. Co.—Neglect to carry goods.*]—To a declaration for breach of contract to carry goods within a time agreed on, or within a reasonable time, from G. to B., defendants pleaded setting up a special condition of the contract, that defendants “should not be liable under any circumstances for loss of market or other claims arising from delay or detention of any train, whether at starting or any of the stations, or in the course of the

journey, nor for damages occasioned by delays from storms," &c.

Replication, that the damages sued for arose from negligence and omission of the defendants and their servants within the Railway Act of 1868, sec. 20, sub-sec. 4. D., as amended by 34 Vic. ch. 43, sec. 5, D., in this, that the car in which the goods were placed was negligently allowed to remain at a station unattached to any train, and was negligently attached to a train on a different branch of defendants' railway from that between G. & B., and was carried thereon to W., at a distance from B., and allowed to remain there a long time.

Held, on demurrer, replication bad; for it was not a traverse of the plea, but the allegation of negligence was dependent upon the previous reference to and reliance on the Statute.

Quære, whether the replication of negligence alone would have been an answer to the plea, independent of the Statute.—*Allan v. G. W. R. Co.* 483.

3. *Railway Contract—Pleading—Performance of conditions precedent—C. L. P. Act, sec. 87.*—Declaration on a deed, set out in it, by which plaintiff was to do all the work on an extension of defendants' railway. By the 17th clause of the deed defendants covenanted to provide all the rails required for the extension and works connected therewith, and further, when required by plaintiff, to supply him with engines, &c., for the purpose of ballasting, &c. By the 19th clause defendants agreed to pay the plaintiff for the work and materials the scheduled prices by monthly payments in certain proportions specified, and within a

time named after the giving of a certificate by defendants' engineer. Clause 20 provided that the plaintiff would accept, during the first five months, defendants' notes at three months in payment, defendants agreeing to place at the order of the plaintiff till the notes were paid by them defendants' bonds to the value of said notes, such bonds being estimated at 85 per cent. of their face value, and after the first five months defendants agreed to pay cash. Clause 22 declared time to be of the essence of the contract. The declaration averred that "the plaintiff did all things necessary on his part to entitle him to have the said contract performed by defendants, and the time for so doing has elapsed." The breaches assigned were, that the plaintiff duly performed work in accordance with the contract to the amount of \$204,000, and received \$154,000, but defendants had not paid the balance. 2. That the plaintiff did large quantities of rock excavation and extra work, and was entitled to \$50,000 therefor, which defendants had not paid. 3. That defendants did not during the first five months "deliver to the plaintiff" their bonds to the value of the notes, &c. 4. That defendants did not provide iron rails, &c.

Twelfth plea, as to \$15,000, parcel, &c., that before action, at the plaintiff's request, defendants delivered to plaintiff their acceptance of his bill of exchange for said sum, which bill was current at the commencement of this suit, and was afterwards paid.

Held, on demurrer, plea good, following *Henry et al. v. Earl*, 8 M. & W. 228, and *Horner v. Denham*, 12 Q. B. 813, note.

Held, also, that the general allegation in the declaration, that the plaintiff did all things necessary on his part to entitle him to have the contract performed, &c., would only cover acts to be done by the plaintiff, and therefore that it sufficiently averred the request by the plaintiff to provide the engines, &c., but not that the engineer had granted the certificates; but that this defect was covered by defendants pleading over.

Held, also, that the third breach, that defendant did not deliver said bonds to the plaintiff, was bad, for defendants' covenant was to place said bonds at the order of plaintiff, which was capable of a different meaning.—*Shanly v. Midland R. W. Co.* 604.

See ARBITRATION—DEFAMATION, 2—INSOLVENCY 1, 2—INSURANCE, 2, 5—INTRUSION—LEAVE AND LICENSE—PAYMENT—PENALTY 1—WATERS AND WATER COURSES, 1, 2.—WORK AND LABOUR 1.

POSSESSION.

See CRIMINAL LAW—LIMITATIONS (STATUTE OF).

POSTMASTER GENERAL.

See CONTRACT, 2.

POSTPONEMENT OF TRIAL

Under 32-33 Vic. ch. 35]—See CRIMINAL LAW.

PRACTICE.

See INSOLVENCY, 3—SERVICE OF PROCESS—RULES AND ORDERS—SPECIAL CASE—NE RECIPIATUR—VERDICT, 1.

PRINCIPAL AND AGENT.

See DEFAMATION, 1—HUSBAND AND WIFE, 2.

PRINCIPAL AND SURETY.

See PAYMENT.

PRINTING.

For Parliament, &c.]—See CONTRACT, 2.

Newspaper]—See PARTNERSHIP.

PRIVILEGED COMMUNICATION.

See DEFAMATION.

PROCESS, SERVICE OF.

See SERVICE OF PROCESS—CONTRACT, 1.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC WORKS.

See HIGHWAYS, 4.

QUEEN'S COUNSEL.

Appointment of, 620.

RAILWAYS AND RAILWAY COMPANIES.

1. Libel, publication by agent of corporation—Privileged communication—16 Vic. ch. 99 sec. 10.]—S., the general manager of the defendants' railway, without special instructions of the directors, dis-

missed the plaintiff, a conductor, for alleged dishonesty; and by his directions placards describing the offence, and stating the plaintiff's dismissal, were posted up in the company's private offices (in some of which they were seen by strangers), and in circular books of the conductors, for the information and warning of the company's employees, 2000 in number.

Held, affirming the judgment of the Court below:

1. That the defendants were liable for the publication, as being an act done by their general manager in their interest and within the general scope of his duty.

2. That the communication to the employees was privileged, as made by a person having a duty or interest to persons having a corresponding duty or interest.

3. That this was not an action within 16 Vic. ch. 99, sec. 10, and necessarily to be brought within six months.—*Tench v. The Great Western R. W. Co.*, 8. (In Appeal.)

2. *Land for Railway purposes—Payment to one not owner—Right of true owner to compensation or ejectment—16 Vic. ch. 99, sec. 7.*]

While the plaintiff, the true owner of the land in question, was absent in Australia, the Hamilton and Toronto Railway Company (subsequently amalgamated with defendants) agreed to purchase the land for the purposes of their railway—without arbitration—from the plaintiff's brother, believing him to be, as he professed to be, the owner, and paid him the full value therefor, and was by him let into possession.

Held, that the plaintiff could not maintain ejectment for the land, but must look to defendants for

compensation under the statutes.—*McLean v. Great Western R. W. Co.* 198.

3. *Accident through negligence—Contract limiting liability.*—Declaration, under C. S. U. C. ch. 78, by the administrator of A., alleging that A. was lawfully on the platform at a station on defendants' railway, and defendants so negligently managed and drove an engine and carriages loaded with timber along the line near said station, that a piece of timber, projecting from said carriages, struck and killed the said A.

Plea, that A. was a newsboy in the employ of C. & Co., vending papers on defendants' trains, under an agreement between C. & Co., and defendants, which agreement provided that defendants should carry C. & Co., their newsboys and agents, on their trains, and should not be liable for any injury to the persons or property of said C. & Co., their newsboys or agents, whether occasioned by defendants' negligence or otherwise.

Held, plea good, without alleging that A. was a party to or aware of the agreement.

Quære, if such a contract is to be considered as made with the person carried, and if so, as to the effect of his being an infant.—*Alexander v. Toronto and Nipissing R. W. Co.*, 474.

[This case has been argued in appeal, and stands for judgment].

4. "*The Railway Act, 1868*," sec. 20, sub-sec. 4, D—34 Vic. ch. 43, sec. 5—*Negligence in carriage of goods.*—Sub-sec. 4, of sec. 20, of "*The Railway Act, 1868*," D., gives an action against certain railway companies for neglect to carry goods, &c., &c., but the Act does not apply to the Great Western

Railway Co., the defendants. By sec. 5 of 34 Vic. ch. 43, D., this sub-section "is hereby amended by adding thereto the following words: 'From which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or of its servants;'" and by sec. 7, "The provisions of this Act" are made applicable to every railway company. *Held*, that the sub-section of the earlier Act, as thus amended, did not apply to defendants; but that the effect of the later Act was merely to add the newly enacted words to the sub-section, and "The provisions of this Act," therefore did not include the amendment.—*Allan v. Great Western R. W. Co.*, 483.

[The same point on the Statute has been decided in *Scott v. G. W. R.*, 23 C. P. 175.]

5. *Equality of charges—Undue preference—Consol. Stat. C. ch. 66, sec. 25.*—In 1865 and 1866, defendants charged plaintiffs' testator and other lumber dealers at Lindsay, \$1.60 per M. feet to carry lumber over their line to Port Hope; in 1867, \$1.90, which was authorized by defendants' by-law passed in that year, and sanctioned by the Governor in Council; and in 1868, 1869 and 1870, \$1.80. In 1865 and 1866, defendants carried lumber for certain lumber dealers at Port Perry, 30 miles beyond Lindsay, from Port Perry to Port Hope, at \$2.00 per M., the defendants paying the steamboat charges for carriage between Port Perry and Lindsay, and the harbour dues at Port Hope, which left \$1.38 net to defendants for the carriage from Lindsay to Port Hope.

This arrangement was made in order to obtain the Port Perry trade, which would otherwise have gone by waggon to Whitby, and the same terms were open to all shippers at Port Perry. In 1867, 1869 and 1870, the arrangement with Port Perry dealers left for the same service, \$1.65 net to defendants, and in 1868, \$1.55. In 1870, defendants entered into special contracts with several dealers to carry for different terms of years, at \$1.50 per M. from defendants' wharf in Lindsay, to the wharf at Port Hope, all the lumber that the dealers might manufacture for the American market, or for delivery at the Port Hope wharf. The testator declined such a contract, which was open to all dealers, and paid \$1.80 under protest. These contracts were made by defendants in order to secure the freight from a new road which was about to be opened from Port Perry to Whitby. Plaintiffs having sued defendants on the common counts for the freight paid by their testator from 1865 to 1870 inclusive from Lindsay to Port Hope, in excess of that paid by the Port Perry dealers to defendants for carriage over that distance:

Held, that defendants were justified in entering into the general arrangement with the Port Perry dealers from 1865 to 1869, and the contracts in 1870; and that there was no evidence to shew that the Port Perry dealers gained any "undue advantage" under the arrangement or contracts over plaintiffs' testator, within the meaning of section 25 of "*The Railway Act*," C. S. C. ch. 66.

Held, also, that to support the action, it should have been shewn clearly, and not left to inference, that the plaintiffs' testator was prejudiced in fact.

Semble, that until the by-law was passed, defendants had no right to levy any tolls, but were only entitled as common carriers to a reasonable compensation.—*Scott et al. v. Midland R. W. of Canada*, 580.

6. *Setting out fire—Liability for sub-contractor's negligence — Interference of Railway Company's Engineer.*—*Gillson v. North Grey R. W.*, 128.

See HIGHWAYS, 5—NEW TRIAL—PLEADING, 2, 3—WORK AND LABOR, 2.

REGISTRATION OF CO-PARTNERSHIP.

See PARTNERSHIP.

RENT.

See ESTOPPEL.

RESCINDING JUDGE'S ORDER.

See INSOLVENCY, 3.

RESERVATION.

In deed—Effect of as an acknowledgment of title.—See LIMITATIONS, STATUTE OF, 2.

REVOCATION OF LICENSE.

See LEAVE AND LICENSE.

RULES AND ORDERS.

Remarks as to the extreme length of a rule *nisi*.—*Re Nash & McCracken*, 181.

See GENERAL SESSIONS—HIGHWAYS, 4.

SALE OF GOODS.

Contract to furnish tombstone—Whether one for sale of goods or for

work and labour.—One W. during her lifetime verbally ordered from the plaintiffs a tombstone, to be put up by them at the grave of her late husband. It was begun before and completed by them after her death, and they sued her administrator for the price. *Held*, that the plaintiffs' claim was for the sale of a chattel, not one for work and labor; and there being no contract within the Statute of Frauds, that the plaintiffs could not recover.

Lee v. Griffin. 1 B. & S. 272, followed. — *Wolfenden et al. v. Wilson*, 442.

See CHOSE IN ACTION—CONTRACT, 1.

SEDUCTION.

New Trial—Excessive damages.—In an action for the seduction of plaintiff's daughter, the daughter proved her seduction under a promise of marriage, her removal from her father's house, and concealment for a long period from her father. Certain letters to defendant were put in, which she at first admitted to be hers, but upon some indelicate portions being read, she at once denied that she wrote them. These letters contained an admission of criminal intercourse with defendant's brother, exonerated defendant from blame, and denied any promise of marriage. It appeared that some of the letters had been sent by the daughter under cover to defendant's brother in the States and by him re-mailed to defendant, but the brother was not called, though in court during part of the trial. Defendant in his evidence denied any promise of marriage, but admitted the seduction. The parties were all respectable, and belonged to the farming class. The

jury having given \$1,600 damages, defendant moved for a new trial on the ground of excessive damages, and on the ground that the finding of the jury that there was a promise of marriage, and that the letters were not genuine, was against law and evidence. No affidavit was filed, or new evidence suggested, and defendant declined to pay \$1000 into court, to abide the event of a new trial. Under these circumstances the court refused to interfere.—*Hope v. Davidson*, 550.

SERVICE OF PROCESS.

C. L. P. Act, sec. 44—Service on British subject in England—Contract in Ontario.]—L., residing at Montreal, agent of defendants residing in Liverpool, telegraphed and wrote to the plaintiff at Hamilton, soliciting orders for boiler plate, to be filled by defendants, specifying the quality and terms, to be delivered f. o. b. at Liverpool. Plaintiff wrote on receipt to L. at Montreal, enclosing an order for a certain quantity, to which L. answered next day that the order would go forward by next mail.

Held, that such contract was made in Ontario, at Hamilton, and, following *Cherry v. Thompson*, L. R. 7 Q. B. 574, that under sec. 44 of the C. L. P. Act the plaintiff might serve the defendants residing in England with process and sue them in our Courts, although the breach occurred in England.—*McGiverin v. James et al*, 203.

See CONTRACT.

SESSIONS.

See CRIMINAL LAW—HIGHWAYS, 2.

SET-OFF.

See CARRIERS.—WORK AND LABOUR, 3.

SETTLEMENT OF ACCOUNTS.

Right to open up.]—See PAYMENT.

SHIPPING.

See CARRIERS.

SHORTAGE.

Right to set off against freight.]—See CARRIERS.

SLAUGHTER HOUSES.

See MUNICIPAL CORPORATIONS, 2.

SPECIAL CASE.

The Court should not be asked, upon a case stated without pleadings, to answer questions which could not be raised upon proper pleadings. — *Taylor v. Campbell, Postmaster General*, 264.

See CONTRACT, 2.

SPECIAL DAMAGES.

See DEFAMATION, 2.

STAMPS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

STATUTES (CONSTRUCTION OF.)

C. L. P. Act, sec. 44.]—*See* CONTRACT, 1.
 Married Women's Property Act of 1872, sec. 9—Retrospective Operation of.]—*See* HUSBAND AND WIFE, 4.

Municipal Act of 1866, sec. 226, 340.]—*See* MUNICIPAL CORPORATIONS, 1.

Municipal Act of 1866, sec. 296, subsec. 23. *See* MUNICIPAL CORPORATIONS, 2.

Municipal Act of 1866, sec. 323, subsecs. 1, 2.]—*See* HIGHWAYS, 4.

Municipal Act of 1866, secs. 325, 326, 334.]—*See* HIGHWAYS, 1.

Municipal Act of 1866, sec. 419.]—*See* COUNTY ATTORNEYS, 2.

"*The Railway Act, 1868*," sec. 20, subsec. 4, D.]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

Consol. Stat. C. ch. 28, sec. 10.]—*See* MUNICIPAL CORPORATIONS.

Consol. Stat. C. ch. 66, sec. 25.]—*See* RAILWAYS AND RAILWAY COMPANIES,

Consol. Stat. U. C. ch. 32, sec. 6.]—*See* EVIDENCE, 1.

Consol. Stat. U. C. ch. 104.]—*See* SUNDAY (SELLING ON.)

Consol. Stat. U. C. ch. 113, sec. 17.]—*See* CRIMINAL LAW.

50 Geo. III. ch. 1.]—*See* HIGHWAYS, 2.

16 Vic. ch. 99, sec. 10, C.]—*See* DEFAMATION, 1.

31 Vic. ch. 9, sec. 12, D.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

32-33 Vic. ch. 20, sec. 69, D.]—*See* CRIMINAL LAW.

32-33 Vic. ch. 21, sec. 25, D.]—*See* CONVICTION.

32-33 Vic. ch. 29, secs. 1 & 71, D.]—*See* CRIMINAL LAW.

32-33 Vic. ch. 35, sec. 2, D.]—*See* CRIMINAL LAW.

33 Vic. ch. 13, D.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

34 Vic. ch. 43, sec. 5, D.]—*See* RAILWAYS AND RAILWAY COMPANIES, 4.

29 Vic. ch. 28, sec. 28, O.]—*See* EXECUTORS AND ADMINISTRATORS.

32 Vic. ch. 32, secs. 25, 26, 36, O.]—*See* TAVERN AND SHOP LICENSES.

33 Vic. ch. 19, sec. 30, O.]—*See* CARRIERS.

33 Vic. ch. 20, O.]—*See* PARTNERSHIP.

33 Vic. ch. 27, sec. 1, 2.]—*See* CONVICTION.

35 Vic. ch. 12, O.]—*See* CHOSE IN ACTION.

35 Vic. ch. 16, secs. 1, 9.]—*See* HUSBAND AND WIFE, 1.

STAYING PROCEEDINGS.

On one count only.]—*See* INSOLVENCY, 3.

STREET.

See HIGHWAYS—MUNICIPAL CORPORATIONS, 1.

SUBROGATION.

Right of Insurance Co. to assignment of Mortgage before payment of loss to mortgagee insuring.]—*See* INSURANCE, 5.

SUMMARY TRIAL BEFORE A JUDGE.

See CRIMINAL LAW.

SUNDAY (SELLING ON.)

Conviction for sale on Sunday—Evidence—Sale of peppermint lozenges by druggist—"Selling drugs and medicines."]—Defendant, a druggist in the city of Toronto, sold five cents worth of peppermint lozenges at his shop on a Sunday. The purchaser did not ask for them as medicine, he had no doctor's certificate, and he was asked no questions. It was shewn that peppermint lozenges were generally kept and sold by druggists as medicine. Defendant having been convicted on this evidence under the "Act to prevent the profanation of the Lord's Day," C. S. U. C. ch. 104, and fined \$20 and costs, the conviction was removed by *certiorari*.

Held, 1. That the finding of the magistrate as to whether the lozenges were or were not medicine was subject to review by this Court.

2. That there was no evidence to sustain the conviction; for the article, sold as it was by a druggist,

must be considered *primâ facie* a medicine, though it was not expressly asked for or sold as such, and the case was within the exception in the Act, "selling drugs and medicines," *Wilson, J.*, doubting. The conviction, therefore, was quashed.—*Regina v. Howarth*, 537.

SURRENDER.

Of lease by operation of law.—
See HUSBAND AND WIFE, 3.

TARIFF OF FEES, 177.

TAVERN & SHOP LICENSES.

Tavern and Shop License Act of 1868, sec. 225-26—Conviction under—Right of Appeal.—*F.*, a shop-keeper licensed to sell intoxicating liquors in quantities not less than a quart, was convicted before the Police Magistrate under 32 Vic. ch. 32 O., for selling half a pint of whiskey contrary to the provisions of the Act, and "without the license therefor by law required." His appeal to the General Sessions of the Peace, was dismissed, on the ground that by sec. 25 the conviction was final and without appeal.

Held, that sec. 25 only applied to persons who sold without any license; that *F.* came under sec. 26; and that by sec. 36 he had a right of appeal.—*Regina v. Firmin*, 523.

TENANCY AT WILL.

See LIMITATION (STATUTES OF) 2.

TIMBER.

Sale of timber by deed—Parol agreement—Trover—Evidence of
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conversion.—Defendant, by deed dated 26th September, 1870, agreed to sell to the plaintiff all the merchantable timber, &c., on defendant's land which the plaintiff could make by the 1st of May, 1871; any timber or logs left, standing or cut, after that date to be the property of defendant. The plaintiff made a large quantity of timber, and drew away some of it. On the 27th March, 1871, defendant verbally gave him leave to let the balance of timber made by him remain on the lot till fall, if the plaintiff would not strip the lot too much; and the plaintiff only cut for a day or two after that. Subsequently, and after the 1st of May, the plaintiff was forbidden to take such made timber off by one *K.*, who said he had bought it, and by defendant who, as one witness said, claimed it as his own; and the plaintiff thereupon brought trover.

Held, that the made timber, which vested in the plaintiff as made, might properly be the subject of a parol contract with defendant, independently of the deed, and that the desistance of the plaintiff from stripping said lot before the 1st May was a sufficient consideration for the parol agreement.—*Hedley v. Scissons*, 215.

See CONVERSION.

TOMBSTONE.

Contract to furnish.—See SALE OF GOODS.

TRADER.

Pleading.—A plea setting up a deed of composition and discharge should aver that defendant was a trader.—*Dredge v. Watson*, 165.

Printing and publishing a newspaper is trading.—See PARTNERSHIP.

TRESPASS.

See DAMAGES—LEAVE AND LICENSE.

TROVER.

See CONVERSION.

UNDUE PREFERENCE.

See RAILWAYS AND RAILWAY COMPANIES, 5.

UNREASONABLE CONDITIONS.

Remarks on.—See INSURANCE, 2.

VERDICT.

1. *Verdict with leave to move—Practice.*—In an action for damages to plaintiff's vessel, from obstructions in defendants' harbour, and in which the defendants denied any liability, it was agreed at the trial, after evidence had been given on both sides, to refer the amount of damages to one P., if the Court should be of opinion that defendants were liable; the Court to decide the liability, with power to draw inferences; and leave was reserved to move to enter a nonsuit on the whole case. A verdict was then entered for the plaintiff for \$2,000. The arbitrator on the day before Easter Term following made his award, fixing the damages at \$1679, but defendants' attorney did not know it until the last day of the term.

Held, that the verdict was in effect subject to the opinion of the Court, and that the Court not having decided the liability, the failure of the defendants to move for a nonsuit in Easter Term did not give the plaintiff the right to recover.—*Hood v. The Harbour Commissioners of the City of Toronto*, 148.

2. *Fence Viewers award—Right to nominal damages.*—In trespass, defendant justified cutting the ditch complained of under an award of fence viewers, &c. The jury found for defendant on this issue, and on the general issue that there was no damage. *Held*, that as a right was involved, the plaintiff was entitled to a verdict on the general issue for nominal damages.—*Warren v. Deslippes*, 59.

See INSURANCE, 3.

WAIVER.

Of condition in Insurance Policy.—See INSURANCE, 2.

Of performance of contract.—See WORK AND LABOUR, 3.

WATERING STREETS.

By-law for.—See MUNICIPAL CORPORATIONS, 1.

WATERS AND WATERCOURSES.

1. *Riparian proprietors—Right to flow of stream—Excessive damages.*—The plaintiff and defendant were riparian proprietors on the river Humber, which in the neighbourhood of their lands ran in curves, forming what were termed "ox-bows." Across one of these ox-

bows, the land in which belonged to defendant, defendant several years ago, during low water, caused the sod to be removed a spade deep and thirteen inches wide. When the freshet came it made a new channel in the line of the trench thus cut, and deprived the plaintiff of the flow of the river along a portion of her land, and by directing the flow of the river against it washed away half an acre of her land, which was valued at \$70 per acre. The jury found for plaintiff, and \$500 damages :

Held, that defendant was clearly liable; for the plaintiff was entitled to the natural flow of the stream, which defendant by his act had interfered with: that the maxim *sic utere tuo*, &c., applied; and that it was no answer that the river would have forced its way through sooner or later.

Semble, that if the defendant had made the cut in the usual course of husbandry, and for the purposes of cultivation, he would still have been bound to take precautions to prevent the stream from forcing its way through, and thus injuring his neighbour.

It was objected on the argument, that the declaration charged the diversion of the water to be the direct act of the defendant, whereas it was caused by the freshet; but

Held, that as an amendment, if necessary, would have been allowed, this was no ground for new trial.

The learned Judge who tried the cause thought the damages excessive, and the Court discharged the rule on the plaintiff consenting to reduce the verdict to \$300.—*McLean v. Crosson*, 448.

2. *Navigable river—Obstruction—Notice to remove—Pleading.*—

Declaration: That the plaintiff's vessel was lying almost loaded at the railway wharf at Toronto, near the mouth of the river Don, with a tug to tow it into the harbour, and before the loading could be finished and the vessel towed out, the defendant's vessel came into the harbour and near the mouth of the river: that the entrance to the dock where plaintiff's vessel lay was narrow, and not wide enough to allow plaintiff's vessel to pass defendant's vessel, if the latter entered the mouth of the river before the other went out, of which defendant had notice; and as defendant was about to enter the river, plaintiff gave him notice that the river was too narrow, that the plaintiff's vessel was nearly loaded, and defendant would be delayed only a short time if he waited until plaintiff's vessel passed out: that defendant refused to listen to the warning and remonstrances of the plaintiff, and wrongfully and injuriously brought his vessel into the Don, and kept it there three days after plaintiff's vessel was loaded, and the plaintiff, though ready to proceed with his vessel, was kept there that time idle, and was put to great loss and expense; and further, that defendant so delayed the plaintiff unnecessarily, and was during said time unable to load his (defendant's) vessel, and such delay was caused solely by the wilful and unnecessary act of defendant and his servants, from which defendant could reap no advantage.

Held, declaration bad, for want of an averment of the plaintiff's right to use the *locus in quo*, or that it was a navigable stream, and because it failed to shew an unreasonable obstruction of the stream after the defendant knew that the plain-

tiff had his vessel loaded, and required him to remove the obstruction to enable him to pass out.—*Hall v. Ewart*, 491.

3. *Mill privilege — Diversion of water — Agreement to put in improved wheels.*—Declaration, that the Grand River Navigation Company having acquired the right by Statute for that purpose, demised to W., of whom plaintiff is assignee, certain land in B., together with a sufficient supply of the surplus water to be taken from the said Company for four run of stones: that the plaintiff is occupant of a mill on the premises, which he could if not interfered with, and has been accustomed hitherto to, run with the surplus water so granted; but the defendant has on divers occasions wrongfully and injuriously diverted from plaintiff's mill large quantities of said surplus water, &c., whereby, &c.

Plea—That at the time of the committing of the alleged grievances, defendant was and now is lessee of part of said Company's reserve lands, and had a right under said Company to use enough of the surplus water from the said canal to propel two run of stones in a mill on said land: that defendant had in his mill the same kind of wheels which plaintiff now has in his; and it was agreed between them, in consequence of the scarcity of water, that defendant should put in his mill wheels of the best, and most improved principles, or Leffel wheels, and that the plaintiff, in consideration thereof, would in a reasonable time put in his mill similar wheels, in order to save water and facilitate the working of said mills; that defendant accordingly put said wheels in his said

mill, at great expense, but plaintiff did not put in similar wheels, although a reasonable time elapsed; and that after putting in the said wheels defendant took sufficient and no more than enough water to run his two run of stones, and after taking such water for said purpose there was sufficient surplus water for plaintiff to run his four run of stones with water wheels constructed according to the said agreement; but the plaintiff's wheels were inferior, and used a large quantity of water in excess of what he would have needed for wheels according to the agreement; and the breach in the declaration alleged was caused solely by plaintiff's non-performance of said agreement.

Held, plea bad, for want of an averment that defendant did not use less or no more water with his new wheels than he was entitled to use with his old wheels under his lease

Per Wilson, J., with this averment the plea would shew a substantial defence at law.

Per Morrison, J., the agreement would be a substantial defence if it contained a stipulation that if defendant put in the new wheels he might use as much water as they required, without restriction by plaintiff.—*Watts v. Robson*, 570.

WAYS.

See MUNICIPAL CORPORATIONS — HIGHWAYS.

WORDS.

"*North Westerly quarter.*"]—See DESCRIPTION OF LAND, 1.

"*Selling Drugs and Medicines.*"] —See SUNDAY, (SELLING ON.)

"*Subsequent Parties.*"] — See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

"*Trading Purposes.*"] — See **PARTNERSHIP.**

"*The whole or any part of a tree.*"] — See **CONVICTION.**

WORK AND LABOR.

1. *Building contract—Default of owner to have works ready for contractor—Want of averment of readiness to go on by contractor—Pleading.*] — Declaration on common counts for work and labor, &c., (being certain iron work on an unfinished building.)

Plea, as to \$1,207, that the work was done under an agreement, by a provision in which defendant had a right to deduct \$50 per week for every week after 1st July, 1871, the work remained unfinished; that it remained unfinished twenty-four weeks and one day, whereby defendant became entitled to deduct from the contract price, \$1,207.

Replication, that defendant had not the buildings ready for the plaintiffs to do their work, without averring that the plaintiffs were ready and willing to complete it in time.

Held, on demurrer, replication good.

Semble, that it would have been necessary to aver such readiness by the plaintiff, if the action had been on the contract for not allowing plaintiff to proceed with the work, &c.—*Hamilton et al. v. Moore*, 275.

2. *Contract for construction of railway—Power to terminate by notice—Engineer's certificate—Work done after expiration of time—Quantum meruit.*] — The plaintiff con-

tracted with defendants by deed to do certain work in the construction of their railway by the 1st of January, 1872. The contracts contained a provision that if, in the opinion of defendants' engineer, there were just grounds for apprehension that the work would not be completed *in the manner, and within the time in the contract specified*, it should be the duty of the engineer to serve a written notice upon the plaintiff, setting out the grounds of his apprehension, and specifying the manner together with a reasonable time in which the plaintiff might cause such grounds to be removed, and if at the expiry of such time such grounds of apprehension were not removed, then the engineer should have full power to declare the contract forfeited by notice in writing

The work was not completed by the time specified in the contract, but the plaintiff continued beyond that time, receiving estimates and payments under the contracts; and on the 16th of April, 1872, the engineer served a written notice purporting to be under the provision above set out, stating that in the engineer's judgment there were grounds for apprehension that the work to be done under the contract would not be completed in the manner and within the time specified; that the grounds were that the plaintiff had abandoned the work, and before abandonment sufficient men, &c., had not been employed; that such grounds might be removed by resuming work in five days, with a force sufficient to complete the work contracted for in sixty days from the date of the notice; and that unless such grounds of apprehension were removed in five days in the manner specified,

the engineer would be at liberty to declare the contract forfeited. And by a subsequent notice the engineer declared the contracts forfeited accordingly.

The plaintiff thereupon brought his action on the common counts for work and labor and on the contract, &c. The case was referred to an arbitrator, and in answer to questions submitted by him to the court by a preliminary award, it was

Held, 1, That the contracts could be put an end to under the above condition after the day fixed in them for the completion of the work, the parties having continued the work according to the contract, and as if the contracts still governed.

2. That the engineer had no power to decide conclusively whether the plaintiff's delay of which he complained was caused by defendants' acts and omissions, and that it was still open for plaintiff to prove that it was so caused before the arbitrator, as an answer to a plea setting up a determination of the contract by defendants' engineer under the provision.

3. That the reasonableness of the time given by the engineer by his notice was not a matter for him conclusively to determine, but was open to the consideration of the arbitrator.

4. That the contract prices would govern even for work done after the 1st of January, 1872, unless the plaintiff could shew distinctly that the work was worth more after that date, that the delay was not caused by his fault, and that he had not assented to such prices.

5. That the plaintiff could recover for no work not certified and estimated for by the engineer, (the

contracts providing that payment should be made on such certificates and estimates) except that for work done after the 1st of January the estimate might be dispensed with, if a higher price could properly be charged.—*McDonell v. Canada Southern R. W. Co.* 313.

3. *Building contract—Forfeiture for delay—Set-off—Parol discharge—Consideration.*—Declaration for work and materials in construction of a house for defendants.

Sixth plea: that by deed, dated 31st July, 1871, plaintiff covenanted to finish the works before the 31st of October, 1871, under a forfeiture of \$20 per week for every week the work was left unfinished after that day; that the plaintiff did not complete the works till 20 weeks after said date, and thereby \$400 became due from plaintiff to defendants, which defendants are willing to set off.

Fourth replication, on equitable grounds: that by the said deed the work was to be done to the satisfaction of S. & G., architects, and if any dispute arose between the parties touching the works or the meaning of the contract, &c., it should be referred to S. & G., whose award should be final: that by the said deed defendants agreed to pay the plaintiff \$3,037 on the certificate of S. & G., 80 p. c. on the work and materials, as done and provided, and the balance one month after the whole had been completed, subject to any deduction for the non-fulfilment of the terms of the deed; that the plaintiff completed said works to the satisfaction of S. & G., without objection as to the time within which it was to be done, either from the architects or the defendants: that

the architects certified from time to time, as provided in said deed, and on completion certified that the whole had been completed, and that the plaintiff was entitled to be paid for the same : that more than a month had elapsed after the last certificate was given : that no complaint was made by defendants after or before that certificate, or before suit, that the work had not been completed in time, and no detraction was sought to be made for non-fulfilment of the contract : that defendants by parol waived and discharged the plaintiff from the performance of the alleged covenant, and on completion of the work promised to pay the plaintiff notwithstanding anything in the said indenture to the contrary contained ; and that upon the faith of said promise the plaintiff delivered possession of the premises to defendants, who accepted the same.

Fifth Replication, on equitable grounds : that after the breach in

the plea alleged, the defendants, for good and sufficient consideration, by parol, discharged the plaintiff from the performance of the covenant and damages for the breach thereof.

Held, on demurrer : 1. Fourth replication bad, for it disclosed no equity, and was multifarious, inconsistent, and embarrassing : that the architect could only certify subject to defendants' right of deduction : that the omission to complain was immaterial : that the parol waiver, after breach and without consideration, could not avail : that the promise to pay, as alleged, might mean subject to the deduction : and that the delivering possession to the plaintiffs of their own building, as stated, could form no satisfaction.

2. That the fifth replication was good.—*Simpson v. Kerr et al.* 345.

See CONTRACT, 2—PENALTY, 1, 2.—SALE OF GOODS.







